Reebie Storage and Moving Co., Inc. *and* Truck Drivers, Oil Drivers, Filling Station and Platform Workers, Local No. 705, affiliated with International Brotherhood of Teamsters.[1] Case 13–CA–29467

November 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On October 20, 1992, Administrative Law Judge Robert M. Schwarzbart issued the attached decision. The Respondent filed exceptions with a brief in support and a reply brief.[2] The Charging Party filed exceptions with a brief in support, an opposing brief, and a reply brief.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order as modified.[4]

1. We agree with the judge that the Respondent applied the contract on a ''members only'' basis by limiting its application to only those employees who were union members. As the judge found, the Board does not issue bargaining orders in ''members only'' units. Accordingly, we adopt his finding that the Respondent did not violate Section 8(a)(5) of the Act by failing to apply the terms of the contract to all eligible unit employees. See, e.g., *Schorr Stern Food Corp*., 227 NLRB 1650, 1654 (1977), and *Don Mendenhall, Inc*., 194 NLRB 1109, 1110 (1972). The presence of a ''members only'' contract, however, ''does not shield a party from liability for unlawful conduct occurring thereunder.'' *Schorr Stern*, supra at 1654. In this regard, we agree with the judge that the Respondent, by providing greater remuneration and superior benefits to its employees selected to be union members than to its nonunion employees, unlawfully discriminated against its nonunion employees and thus violated Section 8(a)(3).

2. At the outset of the hearing, the Respondent moved to strike from the complaint the alleged 8(a)(3) and (5) violations discussed in enumerated paragraph 1, supra, on the ground that they were neither contained in the charge nor ''closely related'' to the charge allegations under the test set out in *Redd-I, Inc*., 290 NLRB 1115 (1988), and *Nickles Bakery of Indiana*, 296 NLRB 927 (1989). In this regard, the Respondent contended that these allegations related to its alleged unlawful application of the contract, an allegation that was neither based on the same legal theory nor arose from the same factual circumstances as the refusal to provide information allegation contained in the charge. Observing ''that the purpose for which information is sought is of a piece with the request itself,'' the judge denied the motion. The Respondent excepts to the judge's denial on the ground, inter alia, that the unstated ''purpose'' of a charge should not determine whether a complaint's allegations are closely related to it. We find the Respondent's exception without merit.

As the judge found, union business representatives went to the Respondent's Franklin Park facility in July 1989 to investigate complaints that the Respondent excluded from contract coverage certain employees performing bargaining unit work. Although the business representatives signed up 20–25 employees as new union members, the Respondent continued to exclude them from contract coverage, effectively denying them the wages and benefits of other bargaining unit members who performed the same unit work but who were covered under the contract by virtue of their previous status as union members. Thereafter, on February 6, 1990, the Union sent the Respondent a letter request-

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] More than a year after the close of hearing in this case, the Respondent filed with the judge a motion to reopen the record to receive into evidence an arbitration award in which the arbitrator sustained the Respondent's ''grievance'' that it was not required to make pension contributions on behalf of all employees listed in article four of the 1984–1987 and 1987–1990 contracts because the scope of those collective-bargaining agreements had been limited by past practice and the application of a most-favored-nations clause (the Jackson Addendum) to a smaller group of employees. The Respondent offered the document at issue ''without comment or argument, only to complete the record.'' The judge denied the Respondent's motion. The Respondent excepts to the judge's failure to admit the exhibit for the ''limited'' purpose of establishing that the Respondent's interpretation of the contract was '''reasonable and arguably correct' within the meaning of past Board precedent.'' We find this exception without merit as the Respondent seeks to adduce evidence about an alleged event that occurred after the close of the hearing. *WXRK*, 300 NLRB 633, 633 fn. 1 (1990). We also find that the Respondent's new evidence, even if admitted, would not change the result. In this regard, we note that the judge dismissed the 8(a)(5) allegations of the complaint related to the Respondent's failure to apply the contract to all unit-eligible employees. We note further that the arbitration award is not relevant to the issue of whether the Respondent violated Sec. 8(a)(3), as the judge found, by providing greater remuneration to its employees who were union members than to its nonunion employees.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The judge failed to include in his recommended Order a provision requiring the Respondent to preserve its records for backpay purposes. We shall modify the recommended Order to include such a provision.

ing certain information ''[i]n order to determine compliance with the contract.''[5]

On May 15, 1990, the Union filed a charge against the Respondent alleging, inter alia, that the Respondent unlawfully failed to provide the information requested on February 6 and that the Respondent also unlawfully required employees to resign from the Union and discharged some employees who refused to resign. These were alleged, respectively, as violations of Section 8(a)(5) and (3) of the Act.

After investigation, the General Counsel concluded that all of the allegations in the charge warranted issuance of a complaint. During the investigation, the General Counsel evidently also concluded that various statements allegedly made by agents of the Respondent which were ancillary to the alleged violation of Section 8(a)(3) consisting of discrimination against union members merited separate complaint allegations as violations of Section 8(a)(1). Additionally, as alluded to on the record, in investigating the charge that in violation of Section 8(a)(5) the Respondent refused to provide the Union with information concerning compliance with the contract, the General Counsel learned that, consistent with the Union's basis for requesting the information, the contract in fact was not being applied to all unit members. Accordingly, in the complaint which issued on July 27, 1990, the General Counsel further alleged that the misapplication of the contract also violated Section 8(a)(5) and (3). The failure to apply the contract terms and conditions to employees who ''were not members of the Union'' is explicitly and clearly alleged in the disputed complaint paragraphs VIII and X.[6] In the summary complaint paragraph concerning the alleged violations of Section 8(a)(3), paragraph XIII, the complaint alleges that the conduct alleged in paragraph VII (the termination of union adherents) and in paragraph VIII above (failure to apply the contract to nonmembers) ''discourag[es] membership in a labor organization.''

At the outset of the hearing, the Respondent's counsel moved to strike paragraphs VIII and X of the complaint under Section 10(b). Additionally, in an effort to bolster its contention that paragraphs VIII and X were not closely related to the charge, the Respondent's counsel noted that the complaint alleges both that the Respondent discriminated in *favor* of union members and *against* union members. These remarks were part of a colloquy among the parties' attorneys and the judge concerning the meaning and intent of the disputed complaint allegations preceding the judge's ruling dismissing the Respondent's motion to strike.

In his decision, which we adopt, the judge recommended dismissal on credibility grounds of the independent 8(a)(1) allegations and the alleged 8(a)(3) discrimination against union members. Additionally, he recommended dismissal of the alleged violations of Section 8(a)(5), but as a matter of law, not as a matter of fact. Accordingly, given his finding that the Respondent did discriminatorily fail to apply the contract to nonunion employees, the judge concluded that the Respondent, in this respect, violated Section 8(a)(3).

As the Supreme Court stated in *NLRB v. Fant Milling Co.*, 360 U.S. 301, 307–308 (1959):

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. *NLRB v. I. & M. Electric Co.*, 318 U.S. 9, 18. The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party. To confine the Board in its inquiry and in framing the complaint to the specific matters alleged in the charge would reduce the statutory machinery to a vehicle for the vindication of private rights. This would be alien to the basic purpose of the Act. . . .
>
> Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.

The Court cautioned, however, that the Board does not have ''carte blanche to expand the charge as they might please, or to ignore it altogether.'' Id. at 309. In this regard, Section 10(b) circumscribes the Board's authority to issue complaint allegations on its own authority by requiring that there be a ''sufficient relationship between charge and complaint 'to negate the possibility that the Board is proceeding on its own intitiative rather than pursuant to a charge.'''[7] *Speco*

[5] In its February 6 letter, the Union requested information regarding ''*all* employees performing any movers work'' (emphasis in original). The Respondent understood that the Union's request applied to both union members and nonmembers. In this regard, in its February 14 letter in reply, the Respondent stated, inter alia, that it had received the Union's letter ''asking for certain information about the wages and hours of our employees in the bargaining unit.''

[6] Par. VIII alleges that ''[s]ince on or about November 17, 1989, Respondent has failed to apply the terms and conditions of employment to certain employees in the unit . . . because . . . [they] were not members of the Union.'' Par. X alleges that ''[s]ince on or about November 17, 1989, Respondent has failed to apply [the] collective-bargaining agreement . . . to certain employees in the unit . . . without fist [sic] having obtained the consent of the Union.'' The complaint alleges that the Respondent violated Sec. 8(a)(3) by the conduct alleged in par. VIII and Sec. 8(a)(5) by the conduct alleged in par. X.

[7] In relevant part, Sec. 10(b) provides:

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Corp., 298 NLRB 439, 440 (1990), citing *NLRB v. Central Power & Light Co*., 425 F.2d 1318, 1321 (5th Cir. 1970). In *Redd-I, Inc*., 290 NLRB 1115 (1988), the Board held that in deciding whether complaint allegations were sufficiently related to the charge to satisfy the requirements of Section 10(b), it would apply the closely related test, comprised of the following factors. ''First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to both allegations.''[8] For the following reasons, we find that the allegations at issue here are sufficiently related to the charge to permit their inclusion in the complaint.

The charge allegation that since February 6, 1990, the Respondent failed and refused to provide relevant information to the Union, when considered in the context of what occurred, can only refer to the Union's information request of the same date. As explained above, the Union requested information regarding all bargaining unit members in order to determine compliance with the contract. The Union requested the information in connection with its belief that the Respondent was misapplying the contract by limiting its application to only those bargaining unit employees who were members of the Union. This is precisely the conduct that is alleged as unlawful in complaint paragraphs VIII and X. Thus, it is clear ''that the conduct that triggered the Union's information request was the same conduct that constituted the alleged unilateral change.'' *Wilson & Sons Heating*, 302 NLRB 802, 805 (1991).[9] In these circumstances, we find these complaint allegations have a sufficient factual nexus to the refusal to provide information allegation contained in the charge to satisfy the requirements of Section 10(b).

Additionally, we find these complaint allegations are ''closely related'' to the charge as a legal matter. The charge and the complaint allegations involve the same section of the Act[10] and grow out of the same factual situation, the Respondent's failure to abide by the contract. Moreover, the alleged conduct was directed at the same unlawful object, the circumvention of the application of the collective-bargaining agreement to all unit employees and, more generally, the Respondent's alleged obligation to bargain. See *Roslyn Gardens Tenants Corp*., 294 NLRB 506, 507 (1989). For all these reasons, we find that Section 10(b)'s requirement of a legal and factual nexus between the allegations of the charge and the complaint are satisfied here.

Our dissenting colleague argues that the complaint allegations at issue are flawed because the 8(a)(3) allegation in the charge referred only to discrimination against union members while the 8(a)(3) allegations in the complaint also refer to discrimination against nonmembers. Additionally, the dissent contends that the complaint cannot support the violation found because it refers only to ''discouraging'' union activity while the violation consists of the Respondent ''encouraging'' union activity by discriminating against nonmembers. As to the former contention, as set forth above, we find that the violation found has a sufficient factual and legal nexus not with the charge's 8(a)(3) allegation, which admittedly has a different factual basis, but with the 8(a)(5) allegation, the refusal to provide information.[11] With regard to our colleague's second contention, we note that, despite the complaint's mistaken characterization of the effect of the Respondent's discrimination in paragraph XIII, the nature of the disputed violation was unmistakably clear elsewhere on the face of the complaint. The Respondent was aware of the error prior to the hearing and does not contend that it was disadvantaged by lack of notice or otherwise deprived of due process.[12] Because the Respondent has failed to show that it was prejudiced by the General Counsel's error in the complaint,

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> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person *a complaint stating the charges in that respect* . . . . [Emphasis added.]

Sec. 10(b) also prohibits the filing of stale allegations by providing ''[t]hat no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .'' In the present case, where the complaint issued within 6 months of the unfair labor practices alleged in the charge, there is no contention that the allegations contained in the complaint are untimely.

[8] *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989) (footnote omitted).

[9] In characterizing *Wilson & Sons* as ''inapposite,'' our dissenting colleague ignores the fact that, as explained above, par. X of the complaint alleges that the Respondent violated Sec. 8(a)(5) by failing to apply the contract to certain employees *without first having obtained the consent of the Union*. Thus, as in *Wilson & Sons*, the Union's 8(a)(5) information charge supports the 8(a)(5) unilateral change allegation contained in the complaint. Because the 8(a)(5) unilateral change allegation and the 8(a)(3) discriminatory application allegation are grounded in the same unlawful conduct, as in *Wilson & Sons*, the ''conduct that triggered the Union's information request'' was the same conduct that constituted the unilateral change and the discriminatory application of the contract. In these circumstances, the discriminatory application allegation is closely related to the 8(a)(5) allegations. See fn. 11 below.

[10] Although par. VIII of the complaint alleges a violation of Sec. 8(a)(3), the conduct alleged unlawful therein is identical with the conduct alleged as unlawful in the 8(a)(5) allegation which was dismissed on other grounds. See fn. 11 below.

[11] ''In determining whether essentially similar legal theories underlie different allegations . . . it is not necessary that the same sections of the Act be invoked.'' *Nickles Bakery*, supra at 928 fn. 5.

[12] Indeed, it was the Respondent's counsel who, at the outset of the hearing, called the judge's attention to this matter. The Respondent did not contend at that time that it was disadvantaged by surprise nor did it request a postponement of the hearing.

we conclude that its due process rights were not violated. See generally *Davis Supermarkets v. NLRB*, 144 LRRM 2057, 2062–2063 (D.C. Cir. Aug. 27, 1993), and *Baytown Sun*, 255 NLRB 154, 154 fn. 1 (1981).

3. Finally, as explained above, the judge's finding that the contract was a ''members only'' contract requires the dismissal of the refusal to furnish information allegation. Even assuming that the contract was enforceable, however, we would still dismiss this allegation because we find that there is insufficient evidence to establish that the Respondent refused the Union's request. In this regard, Daniel Ligurotis, the Union's secretary-treasurer and principal officer, sent a letter to the Respondent on February 6, 1990, requesting the names, addresses, rates of pay, and hours worked per day for all employees performing movers' work. The Union requested the information ''[i]n order to determine compliance with the contract.'' On February 14, Salvatore Manso, Respondent's president, responded to Ligurotis' letter. Manso stated that he would ''get to this without undue delay'' and noted that the Respondent was entitled to see copies of contracts that the Union had entered into with other companies that contained terms more favorable than those contained in the Respondent's contract. Manso further stated that ''[p]erhaps we can arrange to exchange this information at our very next negotiating session.'' The Union neither renewed its request at any of the following negotiating sessions nor otherwise responded to Manso's request. On March 28, 1990, after the parties had reached impasse and after the Respondent's employees had gone out on strike, the Union's attorney orally requested the information set out in the February 6 letter. On the following day, March 29, Manso replied to this request by letter. In his letter, Manso stated, inter alia, that he believed that the information requested by both parties in February was no longer of assistance and therefore ''suggest[ed] that we both drop the requests which we made of each other back in February.'' Again, the Union did not respond.

The Board is reluctant to find a refusal to furnish information violation in circumstances where no formal request was made for information[13] or where the failure to furnish information arose from a good-faith misunderstanding.[14] In the present case, although the Union did request certain information on February 6 and March 28, we find that it was incumbent on the Union to answer the Respondent's good-faith responses to ensure that its requests remained active and that no misunderstanding arose. As to the February 6 request, the Respondent responded immediately and offered to discuss an exchange of information at the next bargaining session. The Union neither responded to the Respondent's request nor renewed its request at any of the subsequent negotiating sessions. Thus, the Respondent could reasonably assume that the Union had dropped its request. When the Union orally renewed its request in late March, the Respondent replied immediately and, relying on its belief that the information requested by both parties was no longer relevant, ''suggest[ed]'' that the matter be dropped. Thus, the Respondent did not deny the Union's request, but merely declared its belief that the information requested by *both* parties was no longer relevant. Because the Union did not reply to the Respondent's March 29 letter, the Respondent could only assume that the Union agreed with its ''suggestion'' and had dropped its request. Accordingly, we would not find a violation where, as here, the Respondent responded in good faith to the Union's requests, did not deny those requests, and ''did nothing to foreclose or discourage the Union's option to pursue [its] interest more actively.''[15]

[13] *PRC Recording Co.*, 280 NLRB 615, 644–645 (1986), enfd. sub nom. *Richmond Recording Corp. v. NLRB*, 836 F.2d 289 (7th Cir. 1987) (respondent did not violate Sec. 8(a)(5) by refusing to furnish its books and records to the union where the union never demanded the information); *Litton Industries*, 300 NLRB 324, 336 (1990) (respondent did not violate the Act by failing to give union officials a tour of its facility because the union's ''expression of interest'' in a tour did not amount to formal request).

[14] *Crestfield Convalescent Center*, 287 NLRB 328, 347 (1987) (no violation where the respondent's refusal to furnish an ''updated *Excelsior* list'' arose from one of the respondent's counsel's incorrect judgment as to relevance and where duration of nondisclosure was brief and noninjurious).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Reebie Storage and Moving Co., Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.''

MEMBER RAUDABAUGH, dissenting in part.

I do not agree with my colleagues' conclusion that the Respondent violated Section 8(a)(3) by refusing to apply the contract to nonmembers of the Union. The charge in this case contained no such allegation. Nor did the charge contain a ''closely related'' allegation.[1]

The charge contained no allegation concerning conduct against nonmembers. To the contrary, the charge alleged conduct against *members*. It is alleged that Re-

[15] *Litton Industries*, supra at 336.

[1] See *Redd-I, Inc.*, 290 NLRB 1115.

spondent required employees to resign their membership, and that Respondent discharged them because of their membership. The charge also alleged a refusal to supply information.

By contrast, the complaint alleges, in relevant part, that Respondent refused to apply the contract to *nonmembers*. As shown above, the allegations of the charge are wholly different. Indeed, the allegations of the charge and those of the complaint are diametrically opposed. Further, the factual situation underlying the charge allegations (discrimination against union adherents) is wholly different from the factual situation alleged in the complaint (failure to apply the contract to nonmembers). Finally, the defenses to the charge are not the same as the defenses to the complaint. In view of these differences, I conclude that there is no ''close relationship'' between the allegations of the charge and those of the complaint.

My colleagues seek to relate the 8(a)(5) charge allegations concerning a refusal to provide information and the 8(a)(3) complaint allegations concerning the failure to apply the contract to nonmembers of the Union. However, on examination, the two are not related and are certainly not ''closely related.'' In support of their contention, my colleagues assert that the conduct which ''triggered'' the information request was the refusal to apply the contract to nonmembers. The evidence does not support this assertion. To the contrary, the evidence shows that the information request followed the Union's learning that the contract was not being applied to new *members* of the Union.[2] Consistent with this, the 8(a)(3) allegation of the charge related solely to discrimination against *union members*. In diametric opposition to this allegation of the charge, the complaint alleges an 8(a)(3) failure to apply the contract to *nonmembers*. Thus, far from a close relationship between the relevant allegations of the charge and complaint, there is diametric opposition between the two.

Wilson & Sons, 302 NLRB 802, cited by my colleagues, is inapposite. In that case, the union's 8(a)(5) informational charge was considered to support an 8(a)(5) ''unilateral change'' allegation of the complaint. Both allegations were grounded in Section 8(a)(5)[3] and both were based on the theory that the union is the exclusive representative of all unit employees. In the instant case, the relevant charge is grounded in Section 8(a)(5) and the relevant complaint allegation is grounded in Section 8(a)(3). An 8(a)(3) allegation does not depend on representative status.

Finally, even assuming arguendo that the charge could somehow support the complaint allegation, there is a fatal disparity between the complaint allegation and the violation found by my colleagues. The violation found by my colleagues is that the Respondent violated Section 8(a)(3) by discriminating against nonmembers of the Union. Such conduct, in the language of Section 8(a)(3), unlawfully ''encourages'' membership in the Union. Inexplicably, the complaint alleges that such conduct unlawfully ''discourages'' membership in the Union. Thus, the violation found by my colleagues is diametrically opposite to the allegations of the complaint.[4]

[2] Although the 8(a)(5) charge alleged a refusal to supply information concerning *all* unit employees, this was hardly surprising in light of the 8(a)(5) principle that the Union is the representative of *all* unit employees.

[3] As the Board has observed, closely related allegations usually involve the same subsection of the Act. See *Redd-I, Inc.*, supra at 1118.

[4] My colleagues concede that the General Counsel's complaint was in error. They assert that Respondent called attention to the error, and was therefore not prejudiced thereby. However, the General Counsel did not, at that point, seek to amend the complaint. If he had done so, the error and the resultant confusion could easily have been eliminated. The General Counsel chose not to do so.

Richard S. Andrews, Esq., for the General Counsel.
Edward B. Miller and *David K. Haase, Esqs. (Pope, Ballard, Shepard & Fowle, Ltd.)*, of Chicago, Illinois, for the Respondent.
Sheldon M. Charone and *Martin P. Barr, Esqs. (Carmell, Charone, Widmer, Mathews & Moss)*, of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT M. SCHWARZBART, Administrative Law Judge. This case was heard at Chicago, Illinois, on a complaint issued pursuant to a charge filed by Truck Drivers, Oil Drivers, Filling Station and Platform Workers, Local No. 705, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union).[1] The complaint alleges that Reebie Storage and Moving Co., Inc. (the Respondent) did not meet its obligation to bargain with the Union in violation of Section 8(a)(5) and (1) and Section 8(d) of the National Labor Relations Act (the Act), by failing to furnish the Union, as the duly recognized bargaining representative of certain of its employees[2] with requested information concerning employees within the unit asserted as necessary and relevant to the Union's bargaining responsibilities; that the Respondent violated Section 8(a)(1) of the Act by threatening to discharge its employees unless they resigned from the Union and/or if

[1] The relevant docket entries are as follows: The charge was filed by the Union on May 15, 1990, and complaint issued on July 27, 1990. The answer to the complaint was amended at the hearing which was held November 26 through 29, 1990, and February 21, 1991.

[2] The alleged appropriate bargaining unit is as follows:

All chauffeurs on all moving vehicles, steady helpers, chauffeurs on piano moving vehicles, warehouse foremen, packers and packer-drivers, but excluding all office clerical employees, guards and supervisors, as defined in the Act.

they engaged in a strike, and by later repeatedly telling its striking employees that their return to work was conditioned on resignation from the Union; and that the Respondent, by the above conduct, discriminated against employees in violation of Section 8(a)(3) and (1) of the Act in causing the termination of five employees. The complaint alleges as violative of Section 8(a)(1), (3), and (5) and Section 8(d) of the Act, the Respondent's unilateral failure to apply the terms of the collective-bargaining agreement to all employees working within the unit, thereby discriminatorily and unilaterally denying employees so excluded from receiving the superior contractual wage rates and other job benefits with a result that certain employees were constructively discharged. Finally, the complaint alleges that the Respondent, by its aforesaid unlawful conduct, caused its employees to engage in an unfair labor practice strike. The Respondent filed timely answer to the complaint denying the commission of unfair labor practices.[3]

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Briefs, filed by the General Counsel, the Respondent, and the Union, have been carefully considered. On the entire record[4] of the case and my observation of the witnesses and their demeanor, I make the following[5]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with offices and places of business in Chicago and Franklin Park, Illinois, has been engaged in the storage and transportation of household goods.[6] During the calendar year preceding issuance of the complaint in this matter, a representative period, the Respondent, in the course and conduct of its business operations, transported goods valued in excess of $50,000, to locations outside the State of Illinois.

The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[3] All dates hereinafter are within 1990 unless stated to be otherwise.

[4] At the hearing, I reserved ruling on the motion by the General Counsel and the Union to strike the third affirmative defense in the answer which, in effect, alleges that the Respondent did not violate Sec. 8(a)(5) and (1) of the Act in not applying its collective-bargaining agreement with the Union to all unit-eligible employees because that contract had been applied to the Respondent and to other signatory employees as ''members only'' agreements. Having reviewed the entire record, I will find this defense to be meritorious for reasons to be specified. The aforesaid motion to strike, therefor, is denied. Other procedural rulings made at the hearing are reaffirmed for reasons stated in the record.

[5] The Respondent's posthearing motion, opposed by the General Counsel and the Union, to reopen the record to introduce as newly discovered evidence an arbitrator's award relating to certain of the issues herein arising under Sec. 8(a)(1), (3), and (5) and Sec. 8(d) of the Act, which award issued more than 6 months after the close of the hearing in this matter, is denied. In so ruling, it is noted that it is not necessary to decide whether deferral under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), would be warranted because the Respondent has not requested such deferral. See *Timpte, Inc.*, 233 NLRB 1218 fn. 2 (1977).

[6] Although the Respondent primarily transports household goods, the record shows that the Respondent also provides commercial moving services.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background

The Respondent, a moving company engaged in the transportation and storage of household goods, but which also, to a lesser extent, moves commercial goods, operates two facilities in Illinois—on Clark Street, Chicago, and in Franklin Park.[7]

The seven-story Chicago facility contains 80,000 square feet. The first floor is used for offices and the remainder of the building as a warehouse where household goods and records are stored. Approximately 25 employees work at the Chicago facility, almost all as office employees. As this building is devoted solely to storage, the moving, packing and interstate aspects[8] of the Respondent's operations are run from the Franklin Park facility where most of the events relevant to this proceeding occurred.

The Franklin Park facility is a one-story brick warehouse of about 55,000 square feet, which includes a small office employing approximately five clerical employees. Because of the seasonal nature of the moving industry, staffing figures are subject to great fluctuation. The largest number of employees to have worked at Franklin Park has been about 100, while the smallest number has been 8. However, customarily 25 to 35 employees work at Franklin Park as drivers, packers, helpers, and warehouse personnel. At the time of the events at issue here, about 35 employees were employed at Franklin Park performing work in classifications covered by the collective-bargaining agreement.

Leo Licata was the Respondent's principal shareholder and board chairman. Salvatore J. Manso, whose office is at the Chicago facility, oversaw daily operations as the Respondent's president. Gary Richied, vice president for operations, and Richard Licata, vice president of sales, reported directly to Manso. Local Operations Manager Robert Licata served as dispatcher, while Dominic Salemi was the Franklin Park facility's manager. The record reveals and I find that all of the aforesaid individuals are supervisors and agents of the Respondent within the meaning of Section 2(11) and (13), respectively, of the Act.

Since at least 1974, the Respondent has bargained with the Union as the duly recognized representative of certain of its employees in the unit described above. However, prior to expiration of the most recent collective-bargaining agreement, effective January 15, 1987, to March 15, 1990, the Respondent had done so as a member of the Movers' Association of Greater Chicago (the Association) and had subscribed to the labor agreement between the Association and the Union (the Association contract).

The 1987–1990 Association contract provided for union security in that continued employment for all relevant employees of the employers covered by the agreement ultimately was conditioned on their becoming and remaining

[7] The Respondent is an agent of Allied Van Lines.

[8] About half of the Respondent's business is interstate.

members in good standing of the Union. The contract specified a schedule of straight time and overtime hourly pay rates, increasing each year during the 3-year term of the contract, and provided minimum weekly work/pay guarantees for covered employees, based on such seniority. The guarantees were made applicable under the contract to ''60 percent by seniority on the average of employees called or put to work during any day of the regular'' Monday through Friday workweek, with certain specified exceptions. For example, employees who started their work during Monday through Friday were guaranteed not less than 8 hours continuous work, except that employees called in solely for nighttime commercial moves were guaranteed 4 hours of work at the time and one-half rate. Overtime at the time and one-half also extended to employees who worked beyond an 8-hour daily shift and for all work performed before or after an employee's regular starting or quitting time. The contract made seniority applicable in other ways in the claiming of work assignments.

Employers bound by the agreement were required to make monthly contributions on behalf of covered employees to the Local 705, International Brotherhood of Teamsters Health and Welfare Fund, with lesser specific contributions for employees who were absent because of illness, job and nonjob-related injuries, and for summer replacements. Employer contributions also were to be made on behalf of covered employees to the Teamsters Central States Southeast and Southwest Areas Pensions Fund.

Article 2A, ''*Employer Security*,'' at section B, provided a ''most favored nation'' clause wherein the Union agreed that should it enter into

> any separate contract which shall contain any provisions more favorable to the employer than the corresponding provision of this Agreement, then such provision shall automatically be substituted for the corresponding provision of this agreement and become a part hereof. The Union shall supply the Association with a signed copy of any such contract which grants more favorable terms to the employer involved within twenty-four (24) hours of its execution; and if any question arises as to whether the provisions of any separate Agreement are more favorable to the employer than the provisions of this Agreement, the Union shall supply the Association, on request, with a signed copy of such separate contract.

Although, as noted, the terms of the above-referenced union-security clause in the Association contract provided on its face that as a condition of continued employment, all employees performing unit work ultimately must become union members, the record is clear that of the approximately 30 employees engaged in moving and storage work during the times relevant to this proceeding, the Respondent did not apply the contract terms to all of its relevant employees and, accordingly, only 12 Respondent's employees held union membership and received the terms of the contract.

The General Counsel and the Union contend that the Respondent's unilateral failure to include all employees was unlawfully discriminatory and in violation of the Respondent's duty to bargain. The Respondent, in turn, asserts that the Union, in fact, long had agreed to an arrangement whereby the Respondent was not required to place all its unit-type employees into union membership and under the coverage of the contract, and that its actions in this regard were consistent with industry practice in the Chicago area.

In partial support of the Respondent's position, Manso presented a signed Letter of Understanding, dated January 19, 1987, between the Respondent and the Union, executed at around the time that the preceding Association contract was to expire. This Letter of Understanding eased for the Respondent the terms of the 1987–1990 agreement if certain conditions were met. The Union there agreed that as long as the Respondent engaged solely in moving household goods and had no more than 15 employees, then certain above-noted contract provisions of the 1987–1990 contract, then to become effective, concerning seniority, wage guarantees, overtime, pay and compensation of new hires at percentages of what would be paid to steady employees, would not be applicable. Should the Respondent employ more than 15 employees, the Letter of Understanding would terminate and all provisions of the collective-bargaining agreement would become applicable.

Manso explained that the 1987 Letter of Understanding and an oral agreement, which he asserts was followed in practice, whereby the Union had tacitly permitted the Respondent to not apply the collective-bargaining agreement to all its employees performing unit work. This had stemmed from a meeting Manso had had with the Union's secretary-treasurer and principal official, Daniel C. Ligurotis, in January of that year. Manso, who then was attempting to negotiate a separate agreement with the Union, independent of the Association, had refused the Union's demand that the Respondent sign the same contract as the Association. However, when the Union responded by striking his company, Manso found that the Respondent could not tolerate the 7- to 10-day work stoppage that followed and met with Ligurotis in January 1987, prepared to sign the Association contract.

Manso was the only witness to describe that meeting. He told Ligurotis that his company mainly moved household goods, that it was hard for him to survive in that environment, and that he needed some relief. In response to Manso's questions as to what would happen in their industry with regard to the number of people who were to be working, Ligurotis told Manso not to worry, the Union would not hurt him and would not ever commit Manso to all of the people he had working. Ligurotis asked Manso to just work with the Union and the Union would work with him. The Union did not want to hurt him. Ligurotis stated that if Manso grew, he wanted to grow with him. Ligurotis asked merely that, if the Company grew and time permitted, Manso put more people into the Union. Manso agreed that they could grow together and that it sounded great to him. However, after Ligurotis declined Manso's request to put this representation in writing, Manso asked how was he going to trust Ligurotis. Ligurotis replied that he never would screw Manso. They shook hands and Manso left with the Letter of Understanding which modified the Association agreement only as to the Respondent.

2. The alleged failure to furnish information

As the March 15 scheduled expiration date of the 1987–1990 Association contract approached, the Respondent again

attempted to negotiate a separate collective-bargaining agreement apart from the Association and held three or four negotiating sessions with the Union between February 28 and March 21. It is undisputed that these negotiating efforts ended in impasse.

Earlier, in July 1989, having been advised by Michael Mocerino, one of the Respondent's unit employees, that a number of the Respondent's other employees, who were doing unit work without coverage of the contract wanted union representation, Gerald Rzewnicki and William Dicks, both union business representatives,[9] went to the Respondent's Franklin Park facility and signed up 20 to 25 of the Respondent's employees, including Joseph Martinez, as union members. However, no union dues or contributions to the health, welfare, and pension funds were checked off and remitted to the Union on behalf of those employees and no grievances were filed over the failure to remit dues.

On February 6, 1990, Union Secretary-Treasurer Ligurotis sent the following letter to the Respondent:

> In order to determine compliance with the contract, please forward, as soon as possible, a weekly list from the first week of September, 1989 through the last week in January, 1990, showing names, addresses, rates of pay, and hours worked per day for all employees performing any movers work. The list should be broken down between regular employees and all other employees—excluding summer replacements.
>
> If it is more convenient to have us examine your books and records instead of furnishing such a list, please contact me directly.

Manso replied to Ligurotis with the following February 14 letter:

> I have your letter asking for certain information about the wages and hours of our employees in the bargaining unit. I have not yet had time to review our records to see how much of that information we can put together in a form that would be useful to you. Also, I have not yet had time to talk with my attorney about just what our obligations are regarding responding to your letter. I have a number of other business matters to take care of, but will get to this without undue delay.
>
> Meanwhile, our attorney . . . who will be representing us in these negotiations, tells me that we are entitled to see copies of any contract you have entered into which contain more favorable provisions than you have extended to us during the last negotiations. I would like very much to see those.
>
> Perhaps we can arrange to exchange this information at our very next negotiating session. We have been waiting to hear when that would be.

The remainder of Manso's letter was devoted to suggestions as to when the first negotiating session might take place.

Ligurotis' February 6 letter was the Union's only written demand for the information sought. This request for data was not repeated by the Union at its meetings with company representatives during the negotiating sessions that followed. The Union's only other request was made orally on March 28 by the Union's attorney to counsel for the Respondent, as referenced in the following March 29 letter to Ligurotis from Manso, written a week after negotiations had reached impasse and, as will be discussed, the Respondent's employees had begun what the complaint alleges was an unfair labor practice strike:

> Our attorney . . . tells me that your counsel . . . called him on March 28 about the lists which you had requested in your letter to us dated February 6, 1990. As you will remember, we responded to that letter on February 14, stating, among other things, that [Respondent's Counsel] had advised me that we were entitled to see copies of any contracts your Union had entered into containing more favorable provisions than you had extended to us during the last negotiations. I stated that I would like to see those, and suggested that we might be able to exchange information at our first negotiating session.
>
> During all of our negotiating sessions, you made no further request for this list, and I in turn made no further request for the copies of the more favorable contracts mentioned in my letter of February 14. I assumed that the matter had been dropped, and it did not seem that the information would be of any assistance to us during our negotiations.
>
> The information, however, I see from your letter, was not requested for the purpose of negotiation, but rather 'to determine compliance with the contract.'' If any employee had any complaint about his wages or fringe benefits or hours, he had, as you know, a right to file a grievance under the contract provided he filed it within 14 days of the day on which he or the union had knowledge of the events leading to the grievance. since our employees obviously had knowledge of what wages and fringes they were receiving and since you regularly received the reports on our fringe benefit contributions,[10] it is obvious that the information requested—i.e., a list from September 1989 through the last week of January 1990—could not possibly provide any information relevant to any timely filed grievance.
>
> Since the information therefore could not be of any help in the negotiations which, in any event, have reached a total impasse at this point, nor with respect to any possible grievance which could be filed, I understand that it is not necessary to provide this information.
>
> I also rather doubt that copies of any contracts which were executed during our last agreement would be of any assistance at this time, and I would therefore suggest that we both drop the requests which we made of each other back in February.

The parties agree that although the information requested by the Respondent ultimately was furnished by the Union approximately a week before the start of the hearing in this

[9] Rzewnicki later succeeded Dicks as the union representative principally charged with servicing Respondent's employees on Dicks' death in January 1990.

[10] The parties stipulated, as noted, that for the period from November 1989 through March 1990, the Respondent made monthly contributions to Local 705's health and welfare funds for the same 12 employees.

matter, the Respondent never has provided the data sought in the Union's February 6 letter.

Randall B. Rudolf, an experienced negotiator in the moving industry,[11] testified that during the 1990 contract negotiations, the Association, too, had received a request from Local 705 to provide the names, addresses, hours worked, and other information concerning all employees during a specified time period. However, neither Rudolf's company nor the seven other Association-represented companies of which Rudolf had knowledge supplied that information, although all later joined in the new collective-bargaining agreement between the Association and Union. The Union repeated this request several months after the contract was executed, but the Knous Company and the other concerns still did not furnish the requested information.

3. The contract negotiations

As noted, with the approach of the March 15 expiration date of the 1987–1990 Association agreement, Manso again as in 1987 attempted to negotiate a separate contract with the Union, apart from of the Association, and representatives of the Respondent and the Union met approximately four times between February 28 and March 21 for that purpose. Manso headed the Respondent's negotiating team at these sessions, while the union spokesman at these meetings was Rzewnicki.[12]

At the first negotiating session, the Union presented its proposals. In these proposals, in addition to seeking a $1-per-hour pay increase for each year of the proposed 3-year agreement, vacation pay based on 50 hours,[13] 3 sick days,[14] and, at the Union's option, an $8-per-week increase in health/welfare or pension contributions each year. The Union also would have the right to protect employees from discipline for refusal to make deliveries or cross picket lines or to employers who had locked out their employees.

Rzewnicki testified that during either the first or second negotiating session, on February 28 or March 2, he expressly observed that the Respondent had not been including all of its moving personnel under the coverage of the collective-bargaining agreement, and asked Manso what had happened to all the men the Union had signed up (during the preceding July) and how come the money (dues and contributions to the funds) had not been remitted. Rzewnicki insisted that those newly signed people should be on the seniority list. According to Rzewnicki, Manso replied that he had a special deal. When Rzewnicki told Manso that he did not know of any deal that he had outside of the 1987–1990 collective-bargaining agreement, Manso told him that he had spoken to Ligurotis. Rzewnicki replied that he, too, would check with Ligurotis.

According to Rzewnicki, the parties' principal differences during negotiations concerned the health/welfare and pension plans. The Respondent's attorney, Edward B. Miller, had asked if the Union would sign an agreement without the Local 705 health/welfare and pension plans. The Union stated that they would not. From the Union's standpoint, although disagreement remained as to other issues, those were more readily negotiable.

Manso, in turn, denied that Rzewnicki, during negotiations, had asked about employees that the Union claimed to have signed up in July and wanted to put into the Union. Manso also denied Rzewnicki's testimony that he had claimed to have a special deal with Ligurotis, contending that these matters never came up during negotiations.

During the last negotiating session, on March 21, the Respondent's attorney, Miller, asked the Union's attorney, Sheldon M. Charone, whether it was the Union's position not to budge on the substitution of the Respondent's proposed insured health and welfare for the Union's insured health and welfare plan, the Respondent's proposed pension plan for the Union's pension plan, the subcontracting issue, and on the guaranteed workweek. Charone and Rzewnicki affirmed that the Union would not budge on those issues. Miller answered that the Respondent needed that relief and that it could not sign a contract that did not have those changes. The Respondent's uncontradicted position was that at that point impasse was reached.

According to Manso, Charone, after briefly absenting himself from the room, returned to announce that Ligurotis wanted to see Manso. When Manso asked if it was okay for his attorney to accompany him to see Ligurotis, Charone again left the room and returned with the information that Ligurotis would see Manso alone but not with his attorney. Manso agreed to this.

Manso testified, also without contradiction, that later that day, March 21, he met with Ligurotis at the latter's office. Manso told Ligurotis that he needed relief on some of the four big issues.[15] Ligurotis replied that the Union could not budge on those matters because of the Association. If he gave relief to Manso, he would have to give it to everybody and he could not. Ligurotis acknowledged awareness that Manso's problems were different from those of the Association, noting that Manso was negotiating individually rather than through the Association. Although Ligurotis understood this, he could not give Manso what he wanted. Manso replied that he did not want to see this day come because they all had to get on with their lives and Manso always had been a union man; his father was on the board of directors at the International Brotherhood of Electrical Workers; and his

[11] Rudolf, president of the George W. Knous Moving & Storage Company, Incorporated, when he testified was the then-current president of the Moving Association of Greater Chicago and had served on the Association's negotiating committee in bargaining with the Union for about 3-1/2 years. The Knous Company was from the standpoint of personnel employed about twice the size of Respondent.

[12] Rzewnicki, a Teamsters business agent for more than 21 years, had held that position with Teamsters Local 711 when, in 1972, it merged with Local 705. In January, as noted, he became the business agent for the Respondent's employees succeeding the late William Dicks.

[13] Under the expiring 1987–1990 agreement, employees had received vacations with pay based on multiples of 40 hours of straight time and length of service. Accordingly, an employee completing 1 year of service with the Respondent had been entitled to 1 week's vacation with 40 hours' pay, while an employee with 3 years' service would have 2 weeks' vacation with 80 hours' pay. Maximally, an employee with 20 years on the job would receive 5 weeks' vacation with 200 hours' pay. Under the Union's proposal, vacation pay schedules would become multiples of 50 hours of straight time, rather than 40.

[14] The expiring contract did not provide for paid sick days.

[15] Reiterating, these four issues were health and welfare, pensions, subcontracting, and the guaranteed workweek.

uncle was the president and he had grown up in that mode. Manso was a Local 705 man and had been a Teamster for a long time.[16] Manso's point, however, as expressed to Ligurotis, was that if the parties could not come to an agreement, he had to get on with his life and business, and had to protect his Company. The industry was in recession. Ligurotis replied that he understood Manso's problem and what the Union was up against in the household moving business. Ligurotis declared that he even was sorry that the Union had gotten into the moving business in the first place but it was a fact of life.

Manso told Ligurotis that things had been going downhill for the last 12 years and that Ligurotis had been losing companies every 3 years. Ligurotis replied that he knew. Manso continued that his company was not in the same ball park as those other companies, the ones he had been talking to in the Association, and asked why Ligurotis was trying to treat his company like that. Ligurotis reiterated that if he gave Manso this deal, he would have to give it to the other movers and he could not do that. Manso repeated that he had to live his life. Ligurotis said that he understood and the two men shook hands. However, as Manso was leaving the room, Ligurotis told him, ''Sal, it is not over yet.'' Manso told Ligurotis that he did not know what he was talking about, and left.

Later still on March 21, the Respondent's attorney, Miller, sent the following letter to the Union's attorney, Charone:

> Just so there is no possible understanding re Reebie: Sal tells me Dan Ligurotis indicated to him that the bargaining ''isn't over.''
>
> We had a clear understanding that today was ''make or break day.'' Reebie modified its proposal in certain respects, and your negotiators found it unacceptable. Your negotiators changed their position in certain respects, and Reebie found your proposals unacceptable.
>
> We both agreed that neither Local 705 nor Reebie had any further proposals to make, and your people stated there was no way Local 705 would sign a contract which did not retain (1) Central States Pension, (2) weekly guarantees, (3) Local 705 Health and Welfare, and (4) prohibitions against subcontracting. Reebie advised you it would not sign a contract containing any of those provisions.
>
> If Mr. Ligurotis' remarks indicate that you have a proposal to make or to break this impasse, please forward it to me immediately because we take very seriously our understanding that this was make or break day, and our extension expires at midnight tonight.[17]

Driver Gary Hornbaker[18] testified without contradiction that on the evening of March 21 he returned a telephone call from Manso. Manso told Hornbaker that he wanted to give him some background on what he was going to do. Manso stated that he was going to restructure the Company and would introduce a percentage payment policy to replace the hourly rate previously paid to employees under the expiring agreement. He told Hornbaker that there was a chance that the Union would want to strike him because they could not reach agreement, and asked whether, if the Union should strike, would Hornbaker stay and work for him. Hornbaker said no, he would not; he wanted to stay with the Union. During that conversation, Manso did not say that he was going to hold a meeting of employees the next morning.

4. The March 22 meeting

On March 22, at approximately 7 a.m., Manso conducted a meeting of approximately 30 to 35 Franklin Park employees at that facility. Also present were Leo Licata, the Respondent's principal and board chairman; Gary Richied, vice president, operations; Robert Licata, local operations manager (dispatcher); and Dominic Salemi, the Franklin Park facility's manager. The parties stipulated that, at the meeting, Manso read aloud to the assembled employees a prepared statement, copies of which were given to employees during the session, principally by Richied. Manso then answered questions from employees.

A major evidentiary conflict between the parties is whether, as testified by witnesses for the General Counsel, Manso, in addition to reading his prepared statement, went beyond that document to also tell employees that in order to continue in the Respondent's employ, they would have to resign from the Union,[19] and that employees who participated in a strike against the Respondent would lose their jobs. The General Counsel and the Union contend that as a result of Manso's asserted requirement of resignation from the Union, and threatened discharge for strike action, five employees present at the meeting who were members of the Union considered themselves discharged, either directly or constructively, and that they began to picket the Respondent's premises in what the General Counsel and the Union contend was an unfair labor practice strike.[20] On the following day, these strikers were joined on the picket lines by three more employees, bringing the total to eight. The General Counsel and the Union further assert that the strike was prolonged by the Respondent's maintenance of its requirement that striking employees resign from the Union before returning to work. Manso, other members of the Respondent's management, and certain employees have denied that any of the disputed statements were made to employees either at that meeting or at any later time.

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[16] Manso had started as a truckdriver in the cartage industry in 1968 and became a truckdriver in the moving industry in 1970, in which year he began to work for Leo Licata, the Respondent's principal. In 1974, when Licata took over the Respondent, Manso became the Respondent's dispatcher, while maintaining his membership in Local 705. Early in his career, Manso also had worked as a mover for other unionized employers.

[17] On March 16, the Respondent and the Union entered into an extension agreement extending the expiration date of the then-current collective-bargaining agreement from March 15 through 21. By the terms of that extension agreement, if no agreement were to be reached before midnight of March 21, the collective-bargaining agreement would terminate.

[18] Hornbaker had been employed by the Respondent since November 1984.

[19] Manso explained that although his prepared statement, dated March 16, was not read or distributed to employees until March 22, it had been prepared earlier to coincide with the original expiration date of the contract before that agreement was extended to March 21.

[20] The General Counsel and the Union claim dual status for the five affected employees—that they both were unlawfully terminated dischargees and/or unfair labor practice strikers.

Employee Elbert Wade[21] testified that when Manso conducted the March 22 meeting, he was approximately 10 feet from Manso and clearly heard what was said. As Wade recalled, Manso read from a sheet of paper, telling the employees that the Respondent wanted to go on to some kind of a percentage deal. During the meeting, Manso told the employees that before they could go out to work, they had to ''sign this paper resigning from the Union.'' Wade related that Manso had a paper at the meeting for him to sign. At that point, Wade rose, left the meeting, and went to the back of the parking lot where he met with a group of other union employees, including John Yracheta, Edmund Burke, Gary Hornbaker, and Michael Salazar Sr.[22] Wade testified that he believed that Manso had fired him on March 22 when he had told the group, ''You will resign from the Union or you are terminated.''

Wade did not recall receiving a copy of the statement read by Manso at the meeting, but asserted that even if he had, he could not have read it that day because he did not have his glasses. He also did not recall having received subsequent correspondence from the Respondent, dated May 21 and August 20, which correspondence will be described below.

Wade testified that he could not have afforded to resign from the Union because his wife was seriously ill and had been receiving extensive care and medication, all fully paid by the Union's health and welfare fund at a cost of over $500,000. Wade did not expect that any future employer would have a health plan prepared to continue to meet those expenses because his wife's illness would have predated such employment. Nonetheless, except for picketing, he made no further effort to recover his job of 16 years.

Other employees testified similarly with respect to the events of the March 22 meeting. Synthesizing the testimony of employees John Yracheta,[23] Sandro Lanzano,[24] Gary Hornbaker, Edmund Burke,[25] and Joseph Martinez.[26] Manso, at the March 22 meeting, read from a paper telling the employees that he no longer could abide with the Union because the Union could not come to agreement on his terms and that he was at negotiating impasse with the Union. From that time on, there would be no more Union. Manso told the employees that they would be paid on a percentage basis as opposed to their previous hourly rate and that although the employees would not have the same coverage that the Union had provided under its health and welfare plan, he had a health plan which, although not quite as good, would provide employees with hospitalization. Although Manso basically read his statement, according to these employees, every so often he would look up and say something to the effect that if the employees wanted to continue to work for the Company, they would have to resign from the Union. Manso took approximately 7 to 10 minutes to read his statement. This was followed by approximately 45 minutes during which Manso answered questions from employees. During the question and answer period, Lanzano asked Manso what he meant by ''being permanently replaced,'' as used in Manso's distributed statement. Manso replied that it meant exactly that. The employees would be permanently replaced if they did not resign from the Union. Burke, too, had asked the same question—what would happen if he did not resign from the Union. Manso replied that he would be terminated, in turn, asking how much plainer could he get.

Yracheta testified that Manso told the assembled employees that those who struck him would be terminated and those who wanted to work would have to resign from the Union. There were slips of paper in the office that Gary Richied would have the employees sign.

During the question and answer period, Mike Salazar Sr. asked where their Union was; the employees were under the impression that they had a 30-day extension and wondered why that meeting concerning restructuring of the Company was being held without prior notification. Manso replied in response to the first question that it was their Union and, then, that he had had his meetings with the Union and was not negotiating with them any more or signing anything. That was the way it was going to be. From Manso's prepared text, read at the meeting, he had stated that anybody in the Union who wanted to work for the Company may have to resign from the Union. The Union could fine the employees if they did not resign. Salazar also asked what if someone did not want to resign from the Union and still wanted to work. Manso repeated that the Union could possibly fine that individual.

Joseph Martinez[27] testified that at the March 22 meeting, he received a two-page document from one of the company officials. The front page corresponded to the first page of Manso's statement, read and distributed at that meeting. However, the second page did not continue with Manso's statement but was a blank form that ''I [*space for employee's name*] resign from Union Local 705.'' This was followed by an additional line for the employee's signature.

Martinez asked whether the Respondent was going to continue to deduct from the men's paychecks the costs of any new damages to the equipment that they were driving. Manso replied no, not anymore. When Salazar again asked where the union business agent was, Manso repeated that it was their Union.

[21] Wade, employed by the Respondent as a packer/driver since 1964, has been a member of the Union since 1966.

[22] Salazar's son and namesake, Michael Salazar Jr., also employed by the Respondent, did not join in the strike and, after a few days, Salazar Sr. returned to work under circumstances not detailed in the record.

[23] Yracheta, a member of the Union for about 20 years, had begun to work for the Respondent as a driver in 1971.

[24] Lanzano, employed by the Respondent since February 1981, had been a member of the Union for slightly more than 3 years.

[25] Burke, a member of the Union since about 1958, had been employed by the Respondent since 1963 where he held a unit position as warehouse foreman of the Franklin Park warehouse.

[26] Martinez, employed by the Respondent as a driver since April 1985, had first signed a union authorization card in July 1989. However, he did not actually become a member of the Union until after March 22.

[27] In March, Martinez was a driver for the Respondent, having done that work 6 days a week for the entire year. At that time, he was being paid more than $4 an hour below the contract rate, was not covered by the Local 705 health and welfare plan or by the Central States Teamsters pension plan. Similarly, Martinez did not receive any other job-related health, welfare, or pension benefits in spite of his full-time employment. This was true although Martinez and certain other employees had signed and delivered to the Union an application for membership in that labor organization during the preceding July.

Manso testified[28] that the March 22 meeting was attended by the above-named company officials and 30 to 35 Franklin Park employees—basically drivers, helpers, and packers—at that facility. Negotiations having broken down, he had prepared for a strike and used the March 22 meeting to announce the changes he planned to put into effect. These changes were embodied in the following statement which he read verbatim to the assembled employees and which he then caused to be distributed to them:

> TO ALL EMPLOYEES:
>
> We have been bargaining with [L]ocal 705 of the Teamsters and at this time we have reached an impass[e].
>
> We think the contract we offered was fair, and would be a contract we could live with and hope to be able to compete in this very rough marketplace.
>
> We don't think it is a spectacularly generous package. We can't provide you with that kind of package and still stay competitive.
>
> It does, however, provide for wage increases for our drivers who will go up to $14.00 per hour.
>
> Steady Helper up to 10.00 per hour
> Warehouse Foreman up to $13.31 per hour
> Packing Foreman up to $13.31 per hour
> Packers up to $12.00 per hour[29]
>
> It does, however, provide Health and Welfare coverage for *all* of our steady employees, the same Health and Welfare coverage that the rest of our office employees have. For those of you who had Health and Welfare from [L]ocal 705 our plan is not as good as the one you had, but they were raising the amount of money we had to pay substantially, and we couldn't afford it, but also we want to provide Health and Welfare coverage for all of you. For those of you who have never had Health and Welfare coverage it is now available to you.
>
> Also, for those of you who do not belong to our pension plan you are welcomed to join our 401K pension plan. Please see your supervisor for enrollment forms along with enrollment forms for your Health and Welfare. There is a cost involved in our Health and Welfare plan from you. $5.00 per week, for employee coverage. $10.00 per week, for employee with spouse. $15.00 per week for employees with spouse with children.
>
> Also, there will no more 1/2 hour to and from on local moving!
>
> Crews will be paid on a percentage of the ticket, drivers will receive more than helpers. If an hour job bills out to $1000.00 with a van and 3 men, the driver would receive 14% or $140.00, the helpers would get 9% each or $90.00 each.
>
> Some local moving will still be paid by the hourly rates. ie; portal to portal jobs, local packing by the hour, warehouse work etc. and O&I's of course.
>
> All A V L packing will be on a percentage basis, ie; a 1000.00 packing job would pay a 2 man crew $320.00 or $160.00 a piece.
>
> There will be one less holiday than you had (president's day).
>
> The vacation scheduling will be as follows:
>
> | | |
> |---|---|
> | 1 year | 1 week |
> | 2 years | 2 weeks |
> | 15 years | 3 weeks |
> | 25 years | 4 weeks[30] |
>
> If we have a strike, the company will continue to work, on our terms (with the type of wages and conditions I have just described to you) to anyone who wants to work. If any of our present employees don't cross the picket lines; the law allows us to hire others who do want to work, and the law allows us to replace strikers permanently. That means that so long as a permanent replacement worker does a good job and wants to stay with us, he has a right to the job, and the replaced striker does not.
>
> Some employees have asked us whether the union could fin[e] them for crossing the picket line. The answer is yes, if the employee remains a member of the union. If he wants to avoid being fined, he should resign his union membership, before he crosses the picket line. All that is needed is a simple letter to the union saying that you are resigning your union membership.
>
> We are not at all suggesting that you have to resign from the union to keep your job. We mention resignation only because that is the only way you can come to work during a strike without running the risk that the union will fine you.
>
> We never looked for a strike; We tried very hard to reach an agreement but it has become impossible.
>
> We are putting in effect today this last offer.
>
> We certainly hope that all our employees will want to continue to work for us. Whether or not we have a union agreement and whether or not the union tries to get people to go on strike.
>
> Some of the changes are small and some are very large, but all we are trying to do is survive in a very competitive environment. Our local rates have been

[28] Manso's testimony concerning events at the March 22 meeting was corroborated by the Respondent's vice president, Gary Richied; dispatcher Robert Licata; and by employees McKinley Jordan, Roy Mason, Charles Ingram, and John Haran. The record revealed that Jordan, a van foreman, had been employed by the Respondent for about 22 years and had belonged to the Union from 1971 to 1973 and again from 1985 to 1990, his membership having ended when he resigned immediately after the March 22 meeting.

Mason, employed by the Respondent as a packer/mover for about 4 years, had belonged to the Union from about 1975 until 1981, when he withdrew. Mason was not a union member during his employment with the Respondent.

Ingram, a Respondent's helper for approximately 8 years, also had not belonged to the Union during his employment.

Haran, whose sister's marriage to Manso had ended in divorce some 10 to 13 years before, had worked full time for the Respondent for about 14 years and part time before that. Having worked in sales and, currently, as a driver, he had been in and out union membership for the preceding 10 to 12 years. Haran's most recent period of union membership ended immediately after the March 22 meeting when he, like Jordan and certain others, resigned.

[29] Under the expired contract, drivers earned straight time hourly rate of $13.31; steady helpers—$12.86; warehouse foreman—$12.92, and packers—$12.92. The contract also contained a schedule of daily expense allowances for long-distance drivers and helpers which was not addressed by Manso.

[30] Under the expired collective-bargaining agreement, employees with 1 year of service received 1 week's vacation with 40 hours' pay; an employee with 3 years' service received 2 weeks' vacation; an employee completing 9 years—3 weeks' vacation; 15 years—4 weeks; and 20 years—5 weeks.

> rolled back two years and [we] are still not busy. All of you are very important to us, we want you to be busy. All of you are very important to us, we want you to be happy to work here, work with us and we will work with you.
>
> We have had some bad times and we have addressed them by laying off 40% of our office staff at Clark Street, and also freezing our wages there. Smart companies in bad times do things like this.
>
> This is a big step on our way back to profitability. Walk with us, and you will be as proud as we are that you did.

Manso testified that he took less than 7 minutes to read the above statement, after which he devoted the rest of the hour-long meeting to answering employees' questions. None of the other company officials who attended the meeting spoke to the employees during the meeting. As Manso recalled, employee John Haran asked how the percentages announced in Manso's statement would be applied with respect to local moving and packing and if he still would be hourly paid on office and industrial moves. Manso explained how the percentages would work and affirmed that Haran still would be paid by the hour for the types of moves he had inquired about. Warehouse employees also would be hourly paid. To Michael Salazar's question as to how better paying household moving work would be distributed, Manso declared that seniority would prevail. He answered Burke's question as to why warehousemen would get less money than truckdrivers by stating that he thought that such an arrangement was fair. Manso, however, pointed out that Burke, as an employee with about the highest seniority in the Company, could bid for the best paying jobs. Manso also responded to employee Reggie Wright's question as to how hospitalization, health, and welfare would work under the Respondent's plan. Other questions were asked and answered.

Manso testified that, during that meeting, no employee, on his own initiative, had asked whether the Union could fine them for crossing the picket line in the event of a strike and admitted that it had been his idea to so inform employees that the Union might fine them if they continued to work during a strike against the Respondent while still members of the Union. However, Manso and his above-named corroborating witnesses denied that Manso had stated that in order to be able to work for the Company, employees would have to resign from the Union, or that if employees did not resign from the Union, they would be terminated. He also denied having said during that meeting, or at any other time, that any employee who participated in the strike against Respondent would be terminated. Specifically, Manso denied that Burke had asked what would happen if he did not resign from the Union and further denied having said to Burke that, in such an eventuality, he would be terminated. According to Manso, Wade, too, did not ask what would happen if he did not resign from the Union. Manso did not see Wade, Burke, Yracheta, Salazar Sr., or any of the other employees who commenced, or later joined, the strike leave the meeting before it ended.

5. The strike

Citing Manso's asserted words at the March 22 meeting that if the employees struck, they would be terminated and that if the employees wanted to work for the Company, they would have to resign from the Union, employees Elbert Wade,[31] Edmund Burke, Gary Hornbaker, Michael Salazar Sr., and John Yracheta gathered in the Respondent's Franklin Park parking lot after the meeting. One of their number called the Union to report what had happened. When the individual who had called the Union reported back that their business agent, Gerald Rzewnicki, could not be reached, the men decided to drive to the union hall.

Soon after the men arrived at the union hall, at around 8:45 a.m., they met with Ligurotis who instructed them to return to the Respondent's Franklin Park facility where Rzewnicki, already notified, would meet them. On their return to the Franklin Park warehouse, between 9:15 and 9:30 a.m., they explained to Rzewnicki what had happened. Rzewnicki told them to set up a picket line at the Franklin Park warehouse and asked for volunteers to also set up a picket line at the Respondent's Chicago facility. Wade and Burke volunteered to do that while the others continued to picket at the Franklin Park facility, using pickets sign furnished by Rzewnicki from the truck [sic] of his car. Although the signs originally bore the legend ''Local 705 On Strike,'' 2 to 3 weeks later, the signs were changed to read ''Unfair Labor Practice Strike.''

After March 22, three other Franklin Park employees, Michael Mocerino,[32] Sandro Lanzano,[33] and Joseph Martinez, joined the strike.

When the strike began, Mocerino was away from the premises on vacation. Mocerino testified that on the morning of March 22 fellow employee Gary Hornbaker had called him at home to advise that the Respondent's employees were on strike. Mocerino remained at home for the rest of March 22. On March 23, at about 10 a.m., he called Manso at his office in the Chicago facility to ask what was going on. Manso told him that there was strike and that Manso had proposed the best agreement he could to benefit the employees. According to Mocerino, Manso told him that if he did not agree with this, he would have to be permanently replaced. In response to Mocerino's request for an explanation, Manso stated that Mocerino would have to resign from the Union or be permanently replaced. When Mocerino asked ''what permanently replaced meant,'' Manso told him that he would be fired, and hung up.

That morning, at about 11:30 a.m., Mocerino joined the others on the Franklin Park picket line. Mocerino, in his testimony, explained that he had gone to the picket line because he needed his health/welfare and other job benefits and did not want to resign from the Union. Mocerino first saw the text of Manso's March 22 speech to the employees on March

[31] Wade was the only employee of those named as original strikers to contend that he left the meeting before its conclusion.

[32] Mocerino, employed by the Respondent as a helper for the preceding 3-1/2 years, was a member of the Union.

[33] Lanzano, employed by the Respondent since February 1981, had been a member of the Union for slightly more than 3 years. In accordance with the Respondent's uncontested posthearing notification, I note that Lanzano subsequently resigned his employment with the Respondent on May 3, 1991.

23, when Yracheta gave him his copy to read. Mocerino continued to picket after reading this statement.

Martinez did not fill out the resignation form he testified he had received at the March 22 meeting but, instead, was dispatched and worked a full day on March 22 until around 4 p.m., when he returned and went home. Martinez testified that he did not join the picket line until March 23 at 6:30 a.m., and has continued to picket.

Manso, in his testimony, recalled that Mocerino had not attended the March 22 meeting because he was on vacation, but denied that Mocerino had called him on the following day. Manso further denied that, on March 23, or on any other day, he had told Mocerino that if he did not resign from the Union, he would be permanently replaced.

Lanzano, who was at the March 22 meeting, testified that he did hear Manso tell employees that if they wanted to continue to work for the Company, they would have to resign from the Union and that employees who did not resign from the Union would be terminated, permanently replaced. Lanzano remained during the entire meeting, after which he immediately called the union hall, explaining to the unnamed party who answered that the employees had been informed that they could not go to work that day unless they resigned from the Union. The man at the union hall replied that that was a bunch of baloney. The Union had not known that any meeting was supposed to have taken place and that Manso did not know what he was talking about by telling the employees that they had to resign from the Union. Lanzano was told to go directly to work and that the Union would send business agent Jerry Rzewnicki to the Respondent's facility to take care of the situation.

Lanzano testified that before returning to work, he told Burke, Yracheta, and Hornbaker that the Union had advised him that he did not have to resign from the Union and that he could go to work as normal. Lanzano then returned to work, working only part of the day because the job to which he had been assigned had canceled out.

When Lanzano returned from the March 22 job, he stopped off at the Respondent's nearby Chicago facility to speak to Manso, arriving there from the canceled assignment at about 10 a.m. Manso took Lanzano into Board Chairman Licata's office where the two met privately. Lanzano asked Manso what would happen if he resigned from the Union and the Company and the Union should sign a collective-bargaining agreement the next day? He would be screwed, what then? He would be out of the Union, would not have health and welfare benefits, and would not even have a job. Manso replied he would not be signing a contract with the Union; the Union was crooked. Manso asked how otherwise could it be that he had more than 30 guys working for him who were not in the Union unless the Union was gaining something monetarily from him. The result of that conversation was that Lanzano agreed to go back to work at the Franklin Park facility. Manso asked if Lanzano realized that in order to stay in the Company, he would have to resign from the Union. Lanzano said that he did. Manso reassured Lanzano that he had made a right choice, reminding Lanzano that he had just bought a new home, that he had a family and other considerations. Lanzano told Manso that he would go to Franklin Park and resign from the Union.

When Lanzano returned to the Franklin Park facility at approximately 1 p.m. on March 22, he noted that a strike was in progress with men holding picket signs at the gate. Lanzano drove across the picket line and went to Gary Richied's office where he met with Richied, Salemi, Robert Licata, and Barbara Seiner, clerical operations coordinator, at the Franklin Park facility. Lanzano testified that he told Richied that he had just finished talking with Manso and hoped that he wasn't screwing himself but that he wanted to resign from the Union. Richied told Lanzano not to worry and assured him that the Respondent would take good care of him and that he was making the right choice.

Richied had Seiner type the following letter, dated March 22, which was signed by Lanzano:

> I, Sandro Lanzano, do hereby resign on this day from the Local 705 IBT Union.

After signing the resignation form, Lanzano went home, returning to the Respondent's facility at 6:30 the next morning. Lanzano crossed the picket line to receive his paperwork from Robert Licata for that day's work. Lanzano, however, became upset when he noted that the documents indicated that his assigned job would take no more than 3 hours and would enable him to earn comparatively little for that day's work. Licata replied that that was the only work available for Lanzano that day. In response to Lanzano's complaint that he had just resigned from the Union because the Respondent had told him that it was going to take good care of him, Licata reassured Lanzano that he should not worry, that the Company would take care of him but that that was all the work they had for him that day.

As Lanzano was about to drive his truck out across the picket line, Mocerino, who by then had joined the picket line, approached and asked what Lanzano was doing. Lanzano replied that he had resigned from the Union and was ticked off that he had done so. Mocerino told Lanzano that he probably could get back into the Union. All he had to do was to speak to Rzewnicki, the business agent. Accordingly, Lanzano crossed the street and joined Rzewnicki in his car. He told Rzewnicki that he had made a big mistake and would like to sign himself back into the Union. Rzewnicki told Lanzano to write a statement in his own words as to why he wanted to get back into the Union. Lanzano did so and gave the statement to Rzewnicki, who told him that he was going to give the document to the lawyers. Lanzano joined the picket line where he remained until his May 3 resignation from the Respondents' employ.

6. Employee resignations from the Union

The parties stipulated that employees William Frazier, McKinley Jordan, and Michael Salazar Sr. signed written resignations from the Union, all dated March 22,[34] and typed by Seiner. All these resignations were worded in the same way as had been Lanzano's above-quoted resignation. The record also shows that employee John Haran submitted a like-worded written resignation from the Union on March 22 at about the same time as Jordan.

[34] Salazar's resignation from the Union actually was dated March 26. He originally had joined the strike when it began on March 22, but later returned to work. Salazar and Frazier did not testify at the hearing.

As noted, both Jordan and Haran, who had attended the March 22 meeting and testified in this proceeding, denied that Manso had stated that employees would have to resign from the Union in order to keep their jobs with the Respondent. Jordan testified that Manso had told the employees during that meeting that they could be fined by the Union if they crossed the picket line should there be a strike, and that Manso had said this in response to a question by Jordan.

After the meeting, Jordan had asked Operations Vice President Richied what would happen if they should work during the strike. Richied replied that Jordan might get fined by the Union for working while being in the Union. Accordingly, when Jordan expressed an interest in resigning from the Union, he was steered to Seiner by Richied. Jordan told Seiner that he wanted to resign from the Union and told her the language to use in typing out his resignation form.[35]

Haran also asked Seiner, at about the same time as Jordan, to type up a brief letter of resignation from the Union which he signed. He had not been handed a pretyped form with a request for signature. Haran explained that he had resigned from the Union because he believed that the employees were getting a fair deal from the Company and did not want any repercussions from the Union in the event of a strike should he cross the picket line while still a union member.

Although Michael Salazar Sr. joined the strike when it first began on March 22, on March 26, he resigned from the Union and returned to work.[36]

Manso testified that he first learned that a strike was in progress on March 22 when Richied called to announce that the Franklin Park facility was being picketed. At about the same time, at midday, pickets also appeared at the Chicago facility. The picketing employees were members of the Union, but Manso noted that at least one picketing employee, Joseph Martinez, was not a member of the Union although he was one of the Respondent's employees engaged in moving.

Manso testified that Seiner had typed all the resignation forms. He explained that after the March 22 meeting had ended, one or two of the employees had come to the dispatch window at the Franklin Park facility and asked Manso what to do if they wanted to resign from the Union. He replied that all they had to do was write a short letter. Manso declined the employees' request for help and told them that he would ask one of the secretaries to help them. Accordingly, Manso asked if Seiner would help the men with what they wanted, but did not stay to learn what she had done in this regard.

Although Manso's prepared statement, read at the March 22 meeting, referred to employees resigning their union membership, Richied testified that he had not discussed with Manso or any other company official what to do in the event employees were going to resign and no resignation forms had been prepared at the time of the meeting. Accordingly, when Lanzano later asked Richied for assistance in resigning from the Union, Richied had said that he could not write up a resignation form but could have Seiner do it. He then asked Seiner to see Lanzano and type up something that Lanzano would be willing to sign. He then left. Richied did not suggest what should be put on the resignation letter and does not recall if anybody from the Company had suggested the contents of that letter.

Richied related that when Michael Salazar Sr. asked what he should do, he told Salazar to make up his own mind.

As Richied recalled, when the March 22 meeting ended, he merely asked who was going to work, at which time Robert Licata began to assign work orders. Wade and Yracheta announced that they did not feel well and Lanzano said that he wanted to make a phone call.

7. The applications for 401(k) moneys

The General Counsel and the Union, as noted, argue that the employees who participated in the strike following the March 22 meeting had dual status both as unfair labor practice strikers and as discriminatees. These parties contend that the employees were discriminatorily discharged by the Respondent's requirement that they could continue to work for the Respondent only by resigning from the Union and giving up the contractual pay scale, health and welfare, pension, and other union-associated job benefits. The General Counsel and the Union assert that these employees also were unfair labor practice strikers who had ceased work to protest the Respondent's unlawful conduct. To support their position that the Respondent had terminated these employees, the General Counsel presented evidence concerning the efforts of certain Respondent's employees to obtain their accumulated Section 401(k) pension benefits, indicating that, in at least one such case, the Respondent had notified the administering state agency in writing that the employee had been terminated.

The Respondent, in turn, contends that none of the employees who joined in the strike had been terminated; that employees were not threatened with discharge if they should strike; that, as of the time of the hearing, all would be welcomed back; that there never had been a requirement that employees resign from the Union as a condition of continued employment; and that the affected employees were twice notified in writing that they would be welcome to return while remaining union members. Although the Respondent did indicate on the 401(k) application form of one such employee that he had been terminated, the Respondent maintains that this had been an error resulting from confusion and that the affected employees were economic strikers who were attempting to buttress the Union's bargaining position at contract negotiations that had just reached impasse. The Respondent supported its position that the various employees had considered themselves to be merely on strike and had not terminated their employment, by presenting evidence of conversations with various employees during which they had stated itheir ntent to return to work.

Yracheta, called by the General Counsel, testified that at the end of March or beginning of April, just weeks after the picketing began, he called Manso at his office in the Chicago facility, telling the latter that he wanted to receive his 401(k) pension plan money. Manso replied that there was only one way in which Yracheta could obtain this money; if he was terminated, emphasizing that Yracheta should understand that once he asked for his 401(k) pension plan money, he was terminated. Yracheta told Manso that he already had terminated him at the (March 22) meeting. Manso denied having

[35] This language, as noted, was identical to all the other resignation forms.

[36] As Salazar did not testify, the record contains no explanation as to why he had participated in the strike in the first instance or as to why he had resigned from the Union and returned to work.

done this. Each side repeated their position concerning termination.

Manso asked if that was what Yracheta wanted to do. Yracheta told Manso that he still was undecided. Manso asked if Yracheta wanted to come back to work, but Yracheta did not yet know and would have to let Manso know.

Finally, according to Yracheta, Manso told him that if he wanted his pension plan money, he would send Yracheta an application to send to Lincoln National Pension Insurance Company, Pittsburgh, Pennsylvania, which was administering the Respondent's 401(k) pension plan and he would receive his money within 4 to 6 weeks. Manso invited Yracheta to call him should he hear anything from the Lincoln National. Yracheta testified that on about April 2, he received the requested form titled ''*Contract Holder Directive for Benefit Payment*,'' signed by Manso. Under the reason for payment item, Manso had indicated ''Termination as of of 4/1/90.''

A few weeks after receiving the form, Yracheta mailed it to Lincoln National. Lincoln National thereafter replied that Manso would have to submit the form to enable Yracheta to receive his money. Accordingly, in May, Yracheta called, telling Manso that he personally would have to send the 401(k) form to Lincoln National to enable Yracheta to get his money. During this discussion, Manso told Yracheta that he was sorry, but he had found out that there were only four ways in which Yracheta could get his 401(k) pension money—by termination, death, retirement, or quitting.

Manso asked if Yracheta had decided whether he was going to come back to work for him. Yracheta replied that he would. However, Yracheta testified, Manso stated that if Yracheta worked for him, he would have to resign from the Union. Yracheta said that he understood this. Yracheta did not return to work.

Mocerino, who, as noted, had interrupted his vacation to join the strike, called Manso at his Chicago office on April 3. Mocerino asked for the vacation pay he had coming. Manso said that he would take care of it. Mocerino also asked to get his 401(k) pension money. Manso told Mocerino that he was not eligible. There were four reasons for which 401(k) moneys could be obtained—by death, by retirement, by discharge, or by resignation. When Mocerino protested that Manso had fired them, Manso denied that he had. Mocerino reiterated that Manso had fired them, reminding Manso that, over his signature, he had written ''Terminated as of 4/1/90'' on Yracheta's 401(k) application form. He again repeated that Manso had fired all of them. Manso replied that this was a mistake and hung up.

On April 6, Richied brought Mocerino his vacation pay while he was on the picket line at Franklin Park.

Lanzano, who temporarily resigned from the Union and worked for the Respondent during the first day of the strike before resuming membership and joining the strike, testified that within a week after the strike began, he called Richied at the Franklin Park office. Lanzano asked if he could receive his vacation pay. Richied replied no, because, as instructed, he could not give strikers like Lanzano their vacation pay. When Lanzano asked about his 401(k) pension money, Richied said that he had nothing to do with that and referred him to Manso. Accordingly, Lanzano immediately phoned Manso at the Chicago office.

Lanzano told Manso that Richied had just informed him of Manso's instructions not to give the striking employees their vacation pay and that he wanted his 401(k) pension proceeds if he could not get his vacation pay. Manso denied having stated that strikers would not receive vacation pay, telling Lanzano that he really did not want to screw the employees altogether. Manso reassured Lanzano that he could have his vacation pay and that he would send Lanzano the application for the 401(k) pension money in the mail that day. It was Lanzano's money. Lanzano thanked him.

Manso phoned Lanzano the next day, advising him that he would not be able to receive his 401(k) pension benefits, because he had not been terminated from the Company; Manso never had terminated him. Lanzano angrily asked what was going on; Manso had told him he was fired and now he was telling him that he was not terminated just to keep him from getting his 401(k) money. When the conversation became heated, Manso hung up on Lanzano.

Lanzano then called the 401(k) office in Pittsburgh, Pennsylvania. The agent there told Lanzano that a number of the Respondent's employees had requested 401(k) benefits and that Manso had called and was instructed by the 401(k) lawyers that he should not have told the employees or Lanzano that they had been terminated if on strike.

Lanzano never submitted the application form for his 401(k) benefits, explaining that he had not done so because Manso and the 401(k) office had told him that it would not do any good, that he was not eligible.

Hornbaker, also in the 401(k) pension plan, testified concerning his efforts to recover those moneys. Around the second week of April, after the picketing had been in progress for 2 or 3 weeks, Hornbaker called Manso at his Chicago office and asked if he could get his 401(k) money. Manso replied that Hornbaker could not. Manso told Hornbaker that he had four ways in which to get it. He had to retire or quit or be fired or die. Hornbaker told Manso that he thought he had been terminated. Manso answered that he had not been. When Hornbaker stated that Manso had written ''Termination'' on John Yracheta's form. Manso said that that had been a mistake. He did state that he would send Hornbaker a form, which he later did, but there was nothing he could do beyond that.

Hornbaker later received the form in blank, with no signatures or markings. He has continued to retain this form.

Manso testified that, since 1985 or 1986, the Respondent has made available the 401(k) pension plan to all steady employees.[37]

Manso described his conversations with employees concerning their efforts to recover 401(k) pension moneys. The first such conversation occurred on April 4 when Yracheta called, telling Manso that he wanted to terminate his 401(k) plan. Manso asked what he was doing. Yracheta said that he would not be coming back to work for the Respondent and that he wanted to receive all the money he had coming. Manso replied that he felt had that Yracheta was not returning as he would have loved to have him back. They had been together for a long time.[38] He told Yracheta that if he

[37] Manso defined a steady employee as one who worked 5 days a week every week whether or not a union member. All of the eligible steady employees had not joined the plan.

[38] Manso had known Yracheta for 20 years.

was hurting for money, that 401(k) sum certainly was his, he was entitled to it and Manso would do everything possible to help him get it. Manso told him, however, that he was not familiar with the form because the Respondent's former controller, Renee Wright, laid off from the Company, had taken care of such matters. Manso told Yracheta that he would fill out the form to his best ability, send it to his home and that Yracheta could forward it to the 401(k) office in Pittsburgh, which address Manso promised to provide.

In response to Yracheta's further inquiry, Manso told him that he also could get his vacation pay and promised to take the necessary steps because that money would come much more quickly than his 401(k) proceeds. Manso offered to lend Yracheta money, if needed, to help him get by until Yracheta decided what he wanted to do. Yracheta replied that he thought he might want to go into driving freight or else to go into business for himself.

Manso testified that on the form to help Yracheta obtain his 401(k) money, he had filled in a termination date as of 4/1/90 because he had not known what to do for Yracheta who had indicated that he wanted to terminate his employment. He did not know what else to write because there had been no item on the form concerning strikes. Manso's stated intent in marking Yracheta's application to show termination as of 4/1/90 was not to terminate Yracheta's employment as of that date, but only to aid his participation in the plan. As Yracheta originally had told Manso that he would not be back to work, Manso did not anticipate his return.[39]

The Respondent's 401(k) plan was administered by John Sinclair of Lincoln National with Manso as trustee. Manso related that after Sinclair had received the form from Yracheta, he called Manso and asked what was going on. When Manso explained, Sinclair told him that he never should have sent the form to an employee to forward directly to Lincoln National. The procedure was is that the employee must complete the form and give it to Manso to send Sinclair. Manso promised to do that in the future.

During that conversation, Manso told Sinclair that some of his employees were on strike and that two of them, John Yracheta and Sandro Lanzano, wanted their 401(k) pension money. Sinclair told Manso that he could not give it to them for a strike. When Manso said he had not known that, Sinclair told him they either had to quit or have been terminated. Sinclair asked if they had quit. Manso replied not to his knowledge. When asked if they were terminated, Manso said no. Sinclair repeated that the employees could not get the money for a strike. Manso, in turn, asked Sinclair what to do now as he had told the men that they could get their money and that he would look like a jerk. He would have to call these men back and tell them that they could not get their money. He asked Sinclair, as a favor, to talk to them in the future because he did not want to deal with this situation and was sorry he had gotten involved.

Manso related that about the same day as his inquiry from Yracheta, and before the call from Sinclair, he had received a like call from Lanzano who also had asked for his 401(k) money. Manso essentially told Lanzano what he had said to Yracheta, promising that he would do what he could to enable Lanzano to get the money quickly. He promised to send the form to Lanzano's home so that he could forward it to the 401(k) office. When Lanzano asked about his vacation pay, Manso promised that he would instruct the powers that be to also take care of that.

However, on about April 6, after speaking to Sinclair, Manso called Yracheta and Lanzano, respectively, and told them that he had made a mistake, that he should not have sent them the forms and that they could not get their money. Their response to Manso was not happy. However, they respectively agreed to Manso's request that, in the future they do him the favor of taking up any future discussions of their plan with Sinclair so that they would not think that he (Manso) was trying to do something funny.

8. Picket line incidents

Elbert Wade testified that on April 19, while he was picketing on the street outside the Respondent's Chicago location, Manso walked up to him and twice asked if Wade had a problem with him. At the time, Burke, was sitting nearby in his car. When Wade said yes he had, Manso had fired him, Manso declared that yesterday Wade had called him a punk. Wade replied that there had been a lot of excitement there the day before. Manso told Wade that he would tell him what. He suggested that they should go to the back of the lot and settle this, him and Wade right now. Wade refused and did not talk to Manso at all after that incident.[40]

Manso described two conversations with Wade after the picketing began. The first occurred on April 10, when he approached Wade who was picketing in front of the Respondent's Chicago facility. Manso told Wade that he had known him for 20 years and asked what he was doing out there. Wade replied that he had to stick with the Union. They had saved his wife's life. Manso stated that he could appreciate that; the Union had a great health and welfare system but the Company has one, too, and they would take care of his wife. When Wade said that they would not, Manso asked what do you mean no. The Respondent had been assured by the insurance company that they would take everybody and cover all existing conditions. Manso noted that the daughter of another employee had spinal bifida, which was of great concern, but that the insurance company had assured the Respondent that they would cover that condition. Describing this, Manso asked if Wade had checked as to whether the insurance company would take his wife. Wade replied that Manso did not know what his wife had; she had serious conditions. They would not take her. Manso told Wade that he was not going to debate with him, but reassured Wade that the insurance company would take her. He ended the conversation by telling Wade that he was a valued employee, an asset to the Company, and by expressing the wish that Wade come back.

The second conversation occurred in the morning of April 19. Manso recalled that both he and Wade called each other a few names because Manso had learned the day before that Wade had called him a name. Nothing more had resulted and

[39] Manso did not testify concerning Hornbaker's attempt to gain his 401(k) moneys.

[40] Burke provided limited corroboration for Wade's account, which did not correspond as to date. According to Burke, he recalled one occasion in June when Manso and Wade had an apparently heated exchange with much pointing, arm waving, and loud talking. Burke, however, could not hear what they were saying as he was in his car.

both ended up agreeing saying that it was stupid for them to be calling each other names.

By the time of the hearing, Manso had not replaced any of the striking employees and had stated a willingness to take back any willing to come. He praised Yracheta and Wade as two of the best men the Company had had. The Respondent had given only two ''Mover of the Year'' awards, of which Yracheta and Wade had been the recipients. Had there been a third such award, Burke would have won. He described them as the kind of people that the Company built around and could not replace.

9. Communications concerning return to work

Martinez, as noted, testified that he joined the picket line at the Franklin Park facility on March 23. On that date, he received his paycheck which did not contain all the money to which he was entitled. Accordingly, Martinez called dispatcher Robert Licata at the Franklin Park facility. Martinez testified that Licata asked if Martinez was coming back to work. Martinez replied that he did not yet know. Licata again asked if Martinez was coming back, telling him that if he did, he would have to come back under Manso's rules. He did not specify the rules but simply stated that he would have to return under Manso's rules. Licata also reassured Martinez that he would take care of his paycheck, which he subsequently did.

Martinez further testified that, about 2 days later, Robert Licata called him at home and again asked when Martinez was coming back to work. Martinez again replied that he did not know. Licata told Martinez that if he came back to work, he would return with full seniority. The only thing he would have to do would be to resign from the Union. Martinez answered that he could not resign from the Union. Licata once more asked when Martinez was coming back to work. Martinez told Licata that he would let him know.

Robert Licata recalled that he had called Martinez at home on March 23, as was his custom, to learn who would be working. After the strike had begun on March 22, Martinez worked a full day for him. During this March 23 call, Licata told Martinez that he had him scheduled for the next day. Martinez said that he would be in. Licata denied having told Martinez that in order to come to work, he had to resign from the Union. Licata testified that it would have been inapplicable for him to have made such a statement to Martinez because, at the time, he did not believe that Martinez was in the Union.[41]

Martinez, however, did not thereafter cross the picket line to come to work.

Robert Licata testified that in early May Martinez called to inform him that he, Lanzano, and John Yracheta were going to come to work the next day. Licata replied that he would put them on the list, meaning he would have a job for them. He denied having told Martinez that he and the other named employees would have to resign from the Union before returning to work.

Martinez testified that he received the following letter, dated May 21, from Manso, identical copies of which were sent on the same day to all other striking employees:

> Teamsters Local 705 has filed charges with the National Labor Relations Board claiming that our Company fired you because you refused to resign your union membership. That accusation is untrue and unfair to me. I simply do not understand it.
>
> I enclose a copy of a notice which I gave you before the strike began.[42] As you can see, that notice made clear that we were not threatening any employee with the loss of his job if he did not resign from the union.
>
> We were only warning you only that if you failed to do so before coming across the picket line, the Union could fine you. That is the law and that is the truth. Another Local of the Teamsters Union in Madison, Wisconsin has recently fined employees $5,000 each for crossing a picket line without first resigning from the Union.
>
> Why you would permit the Union to file this charge for you, knowing that you had received my written assurance that there would be no firings if you did not choose to resign form the Union, disturbs me.
>
> Some of you have recently asked whether, if you were to cross the picket line now, you could come back to work. I said that you could, of course, return, and that you would come back to work with full seniority.
>
> The law does permit us to permanently replace strikers. If we decided to so so, and if you were replaced, your job would not be available unless and until your permanent replacement's employment was terminated. But we have not, as yet, permanently replaced any striker.
>
> We are writing this letter to again reassure you that until such time as we decide permanently to replace strikers, you are free to come back to work at any time and with full seniority. Once again, however, we caution you that if you wish to do so, the only way you can avoid the risk of Union fine, is to resign your Union membership before you cross the line.
>
> But whether you resign from the Union or not will have no effect on your jobs rights here. It never has and it never will.

Although Martinez agreed that he had received the May 21 letter and the above-described enclosure, he did not read these documents when they were received, reviewing them only as part of his trial preparation. Accordingly, Martinez did not contact Robert Licata after receiving the May 21 letter to tell him that based on the reassurances in that letter that he would not have to resign union membership in order to return to work, he would be willing to go back.

Martinez also received a second letter from Manso, dated August 20, copies of which also were sent to all striking employees. This letter was as follows:

> You have not been permanently replaced. You are welcome to return to work. You do not need to resign from the Union in order to hold a job here.
>
> We thought we had made this clear before. We have asked the National Labor Relations Board how we

[41] As noted, Martinez did not actually join the Union and strike until at least March 23.

[42] Enclosed with each copy of the May 21 letters to all striking employees was a copy of above the statement Manso had read and caused to be distributed at the March 22 meeting.

> could make it any clearer. They suggested we write you one more time. That is why we are sending this letter.

Although the August 20 letter contained like assurances, Martinez again did not contact Licata to offer to return to work.

Lanzano testified that, on May 8, before the arrival of his copy of the above May 21 letter, he called Manso at his Chicago office immediately after having received a visit at home from Yracheta. Yracheta had reported his very recent conversation with Manso concerning his 401(k) pension plan, and that Manso had stated a willingness to take Yracheta, Lanzano, and Martinez back to work. Accordingly, when Lanzano reached Manso, he asked if what Yracheta had related was true, Manso replied yes, Lanzano could come back with full seniority. In the course of this conversation, he asked when Lanzano wanted to return to work. Lanzano told him that if he was coming back, he probably would be there the Monday of the following week. Manso told Lanzano that he really did not want Martinez but that he did want Yracheta and Lanzano to return. Manso asked if Lanzano wanted him to meet him at the job. Lanzano did not recall his reply but stated that he was going to go back to work because he needed the job to enable him to meet his new house payments and other bills.

Lanzano related that about 10 minutes after the above conversation, Manso called and stated that he would appreciate it if Lanzano would call a certain Board field examiner in Region 13 to explain that Manso was taking him back with full seniority. Manso reiterated that Lanzano realized that he had to resign from the Union. Lanzano said that he did. However, there was no way he could tell the field examiner what Manso wanted him to tell him. He asked if Manso had called Yracheta and told him that that was what he had to do. Manso replied that he had been trying to reach Yracheta, had not been successful, but was going to try calling immediately thereafter.

Lanzano testified that, after that conversation, he decided that he was not going to return to work because Manso had been underhanded with him on the telephone. Lanzano related that even after he received the above-described May 21 letter offering him employment with no requirement that he resign from the Union, the second conversation with Manso had affected his decision as to whether to return. Lanzano, similarly, did not contact Manso about returning to work after receiving the above August 20 letter.

Yracheta's conversations with Manso after the start of the strike related principally to Yracheta's efforts to obtain his 401(k) pension moneys and were described above. During these conversations, as noted, Manso asked if Yracheta had decided whether he was going to come to work for him, emphasizing that if Yracheta worked for him, he would have to resign from the Union. Yracheta replied that he understood this.

Accordingly, when Yracheta received Manso's above May 21 letter, he did not return in spite of the reassurances contained therein.

Hornbaker, too, testified that he did not go back to work after receiving the May 21 letter and its enclosure because he did not want to do so without a contract. Although he believed the statement in the letter that he would not have to resign from the Union to return, it did not make sense for him to work without the Union. If he did not resign his membership, he risked that the Union would fine him. If he did go back to work without a contract and had any problems, the Union could not help him and he also would not receive any union-associated benefits. Accordingly, because it did not make sense to remain in the Union without a contract while working for the Respondent, he might as well have resigned his membership, which he did not want to do. However, from conversation with Manso, he likewise understood that in order to work for the Respondent, he had to resign from the Union.

Burke testified that he did not return to work after receiving Manso's May 21 letter and its enclosure because, at the time, he had spoken to Yracheta and Lanzano, both of whom, after deciding to return to work, had been told that they still would have to resign from the Union. Accordingly, from his conversations with Yracheta and Lanzano, Burke did not believe the statement in Manso's May 21 letter that his job rights would not be affected by his continued union membership. However, Burke did not speak to Manso, Richied, or any other company official as to whether he could return while still a union member.

For like reasons, Burke, after receiving similar assurances in Manso's August 21 letter, did not thereafter contact Manso or any other member of management as to whether he could return to work while retaining his membership in the Union.

Manso testified that he first knew that his employees had accused him of requiring them to resign from the Union in order to work for the Respondent was after May 15 when the charge was filed with the National Labor Relations Board. After checking with his attorney, he sent out the above May 21 letter to all employees who had left work after the March 22 meeting. Manso has denied throughout this proceeding that any such conditions for continued employment had been imposed on the Respondent's employees.

Manso related that, on May 8, approximately a month after their last conversation concerning the 401(k) pension plan, Yracheta again called him. Yracheta stated that he was with Lanzano and Martinez, asked if all three could come back to work and, if they did, would they retain their seniority and also get to drive the trucks that they wanted. Manso said, of course, that this was great and asked when they wanted to come back. Yracheta suggested the next day but then put Manso on hold. When Yracheta returned to the phone, he told Manso that Lanzano had said to him that he could not come back on the following day because of personal business and that Martinez was working somewhere and could not be back to work until the following Monday, May 14. Manso reiterated that this was good news and offered to meet Yracheta the next morning so that he would not feel uncomfortable coming in at Franklin Park. Yracheta agreed to this. Nothing was said about the men resigning from the Union—a matter that never came up.

The next morning, Manso went to Franklin Park to meet Yracheta, stopping for coffee at a restaurant adjacent to the Respondent's warehouse. There, he encountered Yracheta who, seated in his car, called to Manso. When Manso walked to Yracheta's car, he saw that Yracheta looked unshaved and terrible. Manso asked what was the matter. Yracheta said that he had had a change of mind and was not going to come in; he could not. He said that he had to stick this out because

he had promised the Union that he would. Manso observed that this was making Yracheta sick, that he looked terrible, and that Yracheta had to get his life together. Manso hoped he did so no matter which way he went. Manso always would be his friend. Yracheta thanked him and said that he appreciated this. Manso, as he left, told Yracheta that if he ever needed to talk, he should just give Manso a call.

Manso testified that, either late that day or the following afternoon, he called Lanzano whom he was supposed to meet the following day. He explained that he had not wanted to travel to Franklin Park if Lanzano, like Yracheta, should change his mind.

Lanzano, when Manso called, announced that he, too, had had a change of heart and would not be coming in the following day. When Manso asked what was the matter, Lanzano told him that after he found out what Lanzano had said against him in statements to the Labor Board, Manso would find a reason to eventually fire him; that Manso would hold a grudge. Manso replied that he did not know what Lanzano had done or what he had signed, but he did understand that, in situations such as this, people said things they did not mean. He said he hoped that he never would hold that against Lanzano and that he would love to have him back.

Lanzano asked why things had had to go this far. They then talked about the contract and the things that Manso wanted to do, some of the things that the Company was implementing. Manso told Lanzano that the men seemed happy about them.

Lanzano stated that he needed certain guarantees for things that the Union was doing. Lanzano, for example, required dental work. Manso replied that the health and welfare program that Lanzano had had with the Union was far better than the Company's. He never had denied this. The company plan was good, but not as good as what Lanzano had had, but was something that the Company could afford.

The two men discussed their differences at length on the telephone. Lanzano acknowledged knowing that the Company's business was down and that it was making these changes so that the Respondent could survive. Manso also understood what Lanzano was after. As the conversation ended, both men wished each other luck. Nothing had been said by either party about Lanzano resigning from the Union.

Manso related that he had given testimony at an unemployment compensation hearing on July 20. Shortly after that hearing, Mocerino called him at home, telling told Manso that until the unemployment hearing, he never really knew that Manso was sincere in wanting to take everyone back to work. Mocerino apologized that Yracheta, Wade, and Burke had lied at the unemployment hearing and told Manso that he wanted to come back to work. Manso told him that that was great and asked when he wanted to come back. Mocerino asked Manso to let him get it together, to take a few days. He promised to call Manso. During that conversation, nothing was said about a need to resign from the Union.

Mocerino, however, did not call Manso again until October 10 when he reached Manso in his office. Mocerino told Manso that he was working for another employer, no longer was picketing, had not been picketing at the Respondent for a while. He again stated that he wanted to come back to work at Reebie, because he had no seniority where he worked. Manso told him that that was fine. Mocerino, however, stated that he did not want to come back to work at the Respondent while the pickets were up and wanted to wait until the picketing had ended. He then asked if he could come back to work. Manso replied that he did not know when that day was going to come. The Union could picket for 3 years and he could not keep an open date for him forever. Manso did not know what the employees were going to do. He stated that Mocerino could come back to work right then, but as far as the future, he did not know of how long a period they were speaking. Mocerino replied that he was afraid to return to work right then because of possible union reprisals to himself or his family. Manso told Mocerino that he would have to make up his own mind and, when he did, he should let Manso know. He was welcome back.

Manso denied having spoken to Burke, Hornbaker, or Martinez about returning to work.

Manso testified that none of the employees had been replaced by the date of the hearing and that he would take back any who wanted to return.

10. The ''members only'' application of the labor agreement

The record sustains the testimony of Wade, Yracheta, Mocerino, and Lanzano that there were substantial numbers of the Respondent's Franklin Park employees performing bargaining unit work from the Franklin Park facility on steady, regular bases for periods of years without their becoming members of the Union or being included under the coverage of the collective-bargaining agreement.[43] From the undisputed evidence, I find that as of March 21 such coverage and attendant contract benefits, including the health and welfare and the pension plans available under the labor agreement had been extended to only the 12 of the Respondent's roughly 30 relevant employees who were members of the Union. In fact, the parties stipulated that from November 1989 through March 1990, the Respondent had made monthly contributions to the Union's health and welfare fund on behalf of the same 12 employees each month, although the record shows that, during that period, substantially larger numbers of employees were employed who, because excluded from the agreement, received less than the contractual pay rates and were not eligible for the health, welfare, and pension plans and other job benefits provided in that agreement. It also is clear that the Union's above-described unsuccessful efforts, commencing February 6, to obtain information from the Respondent concerning the names, addresses, rates of pay, and hours worked per day for all employees performing any movers work was related to the Union's belated desire to identify employees doing unit work who might be eligible for coverage under the labor agreement but who had not been included.

The General Counsel and the Union argue that the Respondent's asserted unilateral failure and/or refusal to apply the collective-bargaining agreement in its entirety to all regular employees performing unit work and to have them placed within the Union, as specified in the contractual union-security clause, was violative of Section 8(a)(1), (3), and (5) and Section 8(d) of the Act. These parties argue that the Respondent, to save costs mandated by the contract, years be-

[43] As noted, the contract provided for union security.

fore had threatened certain employees who tried to join the Union and had managed, by such threats and other means, to limit union membership and avoid wider application of the contract.

The Respondent, although conceding that economic concerns were a basis for limiting its application of the labor agreement, denies that it had threatened employees to keep them from joining the Union. Rather, the Respondent contends that Manso and Union Secretary-Treasurer Ligurotis had entered into a private oral and long-applied understanding that the Respondent would not be required to place all of its moving employees in the Union or under the coverage of the contract and that this understanding was consistent with industry practice in the Chicago area. Accordingly, the Respondent asserts that other industry employers in the area also had been exempted from providing labor agreement coverage for all of their relevant employees also because of the prohibitive costs of compliance, and that the Union ended its long tolerance of the Company's practices in this regard only in March, when negotiations for a new separate contract with the Respondent, to replace the Association agreement, under which the Respondent had been bound, had reached impasse. The Respondent argues that the Union, in staging the strike on March 22, 1 day after the impasse, had contrived allegations that the Respondent had caused and prolonged the strike by making employment contingent on resignation from the Union and that the Respondent had threatened to discharge anyone who joined in a strike, in order to elevate the status of participating employees from economic strikers to that of unfair labor practice strikers and unlawfully terminated dischargees, and to pressure the Respondent into making further bargaining concessions.

Lanzano, who first had become employed by the Respondent in February 1981, did not become a member of the Union until April 1987. He testified that toward the end of March 1987, he went to Richied's Chicago office where he spoke to him about getting into the Union, telling Richied that he did not have any hospitalization. Lanzano's wages had just dropped from scale to a lesser sum and that there was no way he could afford to pay the $250 a month for the Company's insurance. He asked if Richied could give him company insurance. Richied replied that he could not do that. Lanzano asked what if he went to join the Union? He had to have this coverage; he had a baby coming. Richied replied that if Lanzano went to the Union, he would have no work there. Richied pointed to the door and told Lanzano to get out, that he had no work there. Lanzano, who was not terminated during this incident, joined the Union during the following month.

Shortly after Lanzano joined the Union, Manso called him into his office. Lanzano related that Manso told him that he never would forgive Lanzano for going over his head and going to the Union. He asked why Lanzano had done this. Lanzano told him that he had done so because he felt that Manso was pushing him out of the Company by dropping his wages and by not providing health and welfare when he had bought his home. He reminded Manso that he knew that Lanzano had a baby on the way. Manso reiterated that he would never forgive Lanzano and told Lanzano that as far as getting rid of him was concerned, if he really had wanted to get rid of him, Lanzano would have been in a trunk right then. Another way in which he could have gotten rid of Lanzano, with the Union right behind him, would have been to set Lanzano up as a thief in somebody's home. Manso, however, did not do any of those things and Lanzano continued his employment with the Respondent for the next 3 years.

Hornbaker testified that although he first was employed by the Respondent in 1984, he did not become a member of the Union until around 1988. However, in January 1987, when the preceding contract was expiring, he did attempt to get into the Union. He went to the union hall, surrendered his withdrawal card and was given a card, with instructions to fill it out and to turn it in to his employer. Accordingly, Hornbaker completed the card and gave it to Richied who told him that he would have to see Manso.

On the following day, Manso called Hornbaker into his office before the start of work where he met with both Manso and Richied. The company officials asked why Hornbaker wanted to join the Union and to turn in his withdrawal card. Hornbaker replied that he did not want to lose any benefits. He already had been working for the Respondent long enough without retirement moneys being paid into his pension fund, and he did not want to lose any more. The management representatives told Hornbaker that the men who were in the Union probably were going on strike and that Manso was not going to sign a contract. If Hornbaker wanted to join the Union and to go on strike with the men, he would be fired. Manso stated that Hornbaker would not have a job there any more. Accordingly, Hornbaker was given the choice of staying with the Company and working or of resigning and going out to join the men. Hornbaker chose to stay, because he did not want to be fired.

However, although the employees did go on strike in 1987, as Manso had anticipated, to Hornbaker's knowledge, none were fired. When, in 1988, Hornbaker did join the Union, he was placed in membership by Richied, who gave him a union card and told him to fill it out; he was going to put Hornbaker in the Union. From that point on, Hornbaker received the contract benefits, including health and welfare contributions.

As Manso recalled his 1987 conversation with Lanzano after Lanzano had joined the Union, he asked why Lanzano had gone to the Union without first coming to him. Lanzano replied that he had wanted hospitalization for his family. Manso said that he understood this but asked again why Lanzano had not come to see him first. That was the extent of their conversation. Manso explained that it was normal practice when the Respondent was going to add an employee under the contract, that the employee come to him first. He denied having threatened Lanzano at any time during that conversation.

Manso did not recall the specific 1987 conversation testified to by Hornbaker, but related that he had spoken to Hornbaker many times. He testified that at no time had he threatened Hornbaker with adverse action should he join the Union. He never has discharged or disciplined any employee for having joined the Union and never had a grievance or unfair labor practice matter, except for the present case, based on allegations that Manso had fired or disciplined an employee for having joined the Union. Likewise, no grievance ever was filed to protest the Respondent's conduct in not applying the labor contract terms to all its moving employees.

Richied's denials concerning his attributed 1987 conversation with Lanzano were more general. He did not recall Lanzano having come to his office in March of that year to tell him that he wanted union pay scale and union insurance. Richied had had several conversations with Lanzano about joining the Union but, if Lanzano had come to him on a union matter, he would have referred him to Manso. Richied did not recall whether, in early 1987, he had told Lanzano that if he went to the Union, he would have no work with the Respondent.

In July 1989, as noted, Mocerino advised Union Officials Rzewnicki and the late William Dicks that there were a number of Respondent's employees who wished to be in the Union. During that month, Rzewnicki and Dicks together went to the Respondent's Franklin Park facility where they signed up about 20 to 25 employees as union members. As also noted, Martinez was one of the employees who then received a union authorization card from Dicks. Martinez related that when Dicks gave him the card, he asked how long he had been employed. When Martinez told him that he had worked for the Respondent since 1985, Dicks asked how come union dues had not been taken from his check. Martinez replied that he did not know. Dicks told Martinez that the Company had informed him that Martinez was part-time help. Martinez, however, did not begin to pay union dues until after he had joined the strike in late March. He did not know the status of his union membership during the 9 months between the time he had signed the union card for Dicks and the time he became an active union member on his own initiative.[44] Although, as described by Rzewnicki, 20 to 25 employees signed union authorization cards in July 1989, this did not increase the number of Respondent's employees who became union members or who were brought under the coverage of the collective-bargaining agreement.

Mocerino credibly testified that of the Respondent's approximately 30 employees, there were 12 employees who were union members, all of whom were regular, full-time employees. Of the remaining employees, about five to seven were on-call employees, called specifically to work at certain jobs. These employees had no set hours or days but just came to work as called. The remaining employees were regular full-time workers who performed unit work. Mocerino related that of the employees who signed to join the Union in July 1989, during the visit of Dicks and Rzewnicki, only a small number had been on-call workers.

Manso testified that from 1976 until his January death, Union Business Representative Dicks would stop by to see him about every 3 months, asking how things were going in general, how many men were working and, from time to time, if Manso would put another man into the Union, which Manso would do.

Manso related that around May or June 1989, when Dicks visited Manso at his Chicago office, having just come from the Franklin Park facility, Dicks had told Manso that a lot of people were working and that a number of them wanted to join the Union. Manso replied that he could not put all of those men into the Union, it would murder him and cripple his business. Dicks then said, ''Give me one guy.'' When Manso asked whom he wanted, Dicks mentioned Ken Heathcott. Dicks stated that Heathcott was a nice guy and he wanted to put him in. Manso asked what Dicks wanted him to do and was told Dicks would have Heathcott call him.

About a week later, Manso called Dicks to report that nobody had called. Dicks told Manso to leave matters alone. If Heathcott contacted him, Dicks would contact Manso. Nothing further was done.

The Union noted that during the most recent round of contract negotiations, which ended on March 21, the Respondent, on February 26 and March 21, respectively, had given the Union two comprehensive sets of contract proposals. The Respondent's ''final proposal for 1990 collective bargaining agreement,'' prepared March 15, was given to the Union on March 21. In these proposals, the Respondent proposed to limit the benefits of the contract to a group of nine named ''steady'' employees whose identities were appended to the proposal[45] and proposed that any other employee who, during the preceding 2 calendar years, had been actively at work during at least 45 weeks in each of the said 2 years could be deemed a ''steady employee'' unless and until thereafter laid off for more than 12 consecutive months.

Manso testified that, during these negotiations, the Company, had sought to protect nonunion employees who had worked steadily during the 2 preceding calendar years, as defined in its proposal, although the Union wanted to protect the 12 ''core'' employees, safeguarding the benefits that they had enjoyed under the expiring Association contract and to ensure that those employees would continue to work under contract terms that were different from Respondent's other nonunion and future employees.

Manso testified as to his industry experience in this regard. Manso, who had started as a truckdriver in the cartage industry in 1968, had become a truckdriver in the moving industry in 1970, in which year he had begun to work for Leo Licata at *Licata Moving & Storage Co., Inc*. Manso, during the past 20 years, also had worked for other moving companies in Chicago, specifically Heberd Moving and Storage Company (currently Heberd Porter), which then recognized the Union. During 1971 through 1974, he did extra work at Federal Moving & Storage, as well as Heberd, working for both companies as an extra helper. Although Heberd was under contract with Local 705, Manso did not know Federal's union status at the time.

On the jobs he had worked for Heberd, the employees who worked on moving assignments were approximately 75 percent nonunion and 25 percent union.[46]

[44] Martinez explained unconvincingly that he did not have this information because Dicks passed away in January. However, Dicks apparently had remained on the job for approximately 6 of the 9 months between the time Martinez had signed the card and the time he became an active union member.

[45] The employees on the Respondent's seniority list as of March 1, as shown in the Respondent's proposal, were Edmund Burke, Elbert Wade, John Yracheta, John Haran, William Frazier, Michael Salazar Sr., Gary Hornbaker, Sandro Lanzano, Michael Mocerino, Dominic Salemi, McKinley Jordan, and Curtis Kelly. It has been found above that Salemi, as Franklin Park facilities manager, was a supervisor and agent within the meaning of the Act. Although the status and activities of the other employees in this group are described here, the record contains no further reference to Kelly and Frazier.

[46] Manso clarified that, in 1971–1974 when he served as an extra helper for Heberd, he had worked only on special jobs and on weekends, moving household items, as opposed to commercial. However,

Continued

In 1970, when Manso began his employment with Licata, of the 25 to 30 employees, about 4 were union members served by Business Agent Peter Janapoulis. Licata's principals acquired the Respondent, Reebie, in October 1974, at which time Manso moved to Reebie as general manager. Of the approximately 20 to 30 Respondent's employees at the time, approximately 7 were union members.

Since Manso became the Respondent's general manager in 1974, no grievances ever were filed seeking to require that the larger numbers of unrepresented moving employees be covered by the collective-bargaining agreement or join the Union. In fact, there were no grievances for any reason. Manso affirmed that any such grievances would have been filed with him.

The Letter of Understanding between the Respondent and the Union, supplementing the 1987–1990 Association contract, was the closest written accord between those parties to address the disparity between the broad language of the union-security clause and the lesser number of employees covered by the agreement. As noted, this Letter of Understanding provided that when the Respondent employed no more than 15 employees and engaged solely in commercial moves, the Respondent could have a different pay rate for newly hired employees and enjoy certain other relief from the more stringent requirements of the Association contract. However, it is clear that while, during the term of the Association contract, the Respondent performed household moves as well as commercial, and employed many more than 15 employees, the Union did not terminate that document.

Manso's testimony concerning his experiences at Heberd was corroborated by John Haran, a Respondent's driver who, as noted, was Manso's former brother-in-law and who had been in and out of union membership during the preceding 12 years. Haran testified that as a Respondent's longtime employee, he concurrently had had additional earnings from Heberd from 1978 until about 1981 during periods when work at the Respondent was slow. As the household moving industry was seasonal, movers went from one company to another to fill in their workweek.

Haran testified that from about 45 to 50 percent of the roughly 50 Heberd moving employees were nonunion. Heberd's total numbers would go down to about 15 when that Company was not engaged in moving voting machines, an activity area in which Haran worked. About half of the 15 core employees were nonunion. Haran related that all employees who moved voting machines, including Haran at the time, were union members. However, in less regulated work such as household and commercial moving, the number of union members were less.

Randall B. Rudolf[47] described the experiences of his company and of other members of the Association with respect to the application of the Association contract to all moving employees employed by his Company and other subscribing employers. Rudolf related that during the preceding 3 years, his company, the George W. Knous Moving & Storage, Inc., employed an averaged total of between 50 to 60 employees. The average number of seniority list, or union, employees was between 35 to 50. He testified that it had not been the industry's custom and practice to have all employees covered under the collective-bargaining agreement with the Union. Rather, the practice had been to maintain a regular list of seniority employees and then to have nonregular casual employees supplement the work force when there was an increase in the workload.

Rudolf explained that, in recent years, competition within the industry proliferated because of the Deregulation Act of 1980. This was further expanded in 1984 so that it became much easier than before for new competitors to enter the field. These new competitors, all of which, in the Chicago area were nonunion, created a situation where the only way for unionized companies to survive was to hire lower cost nonunion labor—a practice pretty much followed.

Rudolf identified a May 18, 1987 letter from Ligurotis to Paul Anderson of Jackson Storage & Van Co., Naperville, Illinois. This letter, described in its terms as confidential, was known as the ''Jackson addendum.'' Although applicable solely to Jackson Storage, the Union in that document provided Jackson Storage with latitude in the use of nonunion personnel. In relevant part, the Jackson addendum provided as follows:

> Re: 1987–1990 Labor Agreement
>
> . . . .
>
> At our meetings we have discussed that the company has a four man seniority list[48] and has in the past used employees, subcontractors and independent contractors[49] to perform bargaining unit work when these four individuals are working or otherwise unavailable and that such established past practice has not been protested by the employees. I also understand that the practice of using nonunit personnel, subcontractors and independent contractors has been most prevalent in household goods. From these discussions it is also my understanding that Jackson is not willing to accept the 1–15–87 to 3–15–90 Agreement negotiated between the Movers Association of Greater Chicago and Local 705 without substantial changes. Based on this past practice

Heberd's general manager, a friend, had told Manso that 75 percent of the employees in his barn were nonunion.

[47] Rudolf, president for 13 years of the George W. Knous Moving & Storage, Inc., as noted, testified as current president of the Moving Association of Greater Chicago. On behalf of the Association, Rudolf has engaged in coordinated bargaining with the Union on behalf of various member companies.

[48] Rudolf defined seniority list, or seniority, employees as those who paid union dues and who were listed by seniority from dates of hire. Rudolf's Knous Company posted a ''sign-up sheet,''each workday for its union-member employees and deducted their dues, transmitting them to the Union. Seniority list employees regularly worked 5 days a week and were guaranteed 8 workhours a day. Although seniority list employees usually worked for Rudolf's company 12 months per year, it was unusual for nonseniority employees to do so. Pay for seniority employees could vary from higher to lower than the contract rate paid to seniority list employees, depending on the individual's skill levels. Most of the time, however, nonseniority employees were paid less than the seniority employees.

[49] Rudolf explained that in the Chicago-area moving industry the term ''contractor'' had a dual meaning. In one, more traditional, sense, the term referred to companies who performed services without supervision, and, in that geographic area, it was the generally accepted trade practice for many companies to hire outside contractors to do packing. The alternative definition and, as used at Knous, related to nonseniority personnel.

it is also my understanding that Jackson and Local 705 have reached the following agreements:

1.) Jackson will accept the 1–15–87 to 3–15–90 Agreement between Local 705 and the Movers Association of Greater Chicago as an independent (non association member) company with the modifications, exceptions and additional agreements set forth in this letter.

2.) The Agreement will apply to the four current seniority employees and any seniority employees added pursuant to paragraph 5 below. These employees shall receive the negotiated wage increases and contributions shall be made on their behalf to the Health & Welfare and Pension Plans as set forth in the Agreement whenever they perform work in the classifications listed in Article 4 of the Agreement.

3.) *When seniority employees are offered fulltime work (40 hours per week) or are otherwise unavailable because of absence or lawful termination, Jackson may utilize independent contractors, subcontractors or nonunit employees to perform any and all work. Nothing in the agreement shall apply to restrict or limit the utilization of such persons and, if employees are utilized, no part of the Agreement shall apply to them and they shall not be considered employees under the Agreement for any purpose.*

4.) Jackson agrees that on commercial moving work located in the loop area of the City of Chicago that it will: (a) give preference to experienced industry employees and members of Local 705; (b) request Local 705 to refer applicants pursuant to art. 2, sec. C before utilizing nonunit personnel, independent contractors or subcontractors to perform such moving work; (c) pay all helpers and chauffeurs working on such moves the then applicable hourly rate under art. 4; and (d) pay any contribution to the 705 Health and Welfare Fund that may be required by art. 5 for the hours worked on such moves.

5.) An employee who works for Jackson on a fulltime basis performing commercial moving work (other than at nights and weekends) for six continuous months or for a total of twelve months in an eighteen month period shall be considered a seniority employee. An employee will be considered fulltime only in those months in which he or she actually works at least 140 hours on commercial moving work. *Hours worked on household moving shall not be counted to determine fulltime status*. [Emphasis added.]

6.) No grievance against Jackson shall be taken to the Joint Grievance Committee, unless I have personally met with the company in a good faith effort to resolve the grievance.

7.) That the modifications, exceptions and additional agreements set forth in this letter displace any inconsistent or contrary provisions in the agreement and that in any dispute, disagreement or matter arising under the Agreement this letter-agreement shall be recognized and given full effect.

8.) That this letter-agreement, though binding on both the union and the employer is a private agreement which both Local 705 and Jackson agrees to keep confidential and not to disclose to other moving companies or employers.[50]

Rudolf testified that the practice at his company, in effect, was similar to procedures outlined in the above Jackson addendum. Nonunion casual employees received the first opportunity to sign up for available work. However, if there was overflow work, then the Union had allowed the company to get the job done as best it could. Overflow work not signed for by seniority list personnel was given to ''contractors.'' Nonunion casual employees worked while the job for which they had been hired was in progress and left when it ended. This was true even if the casual employee worked 5 days a week, 8 hours a day for a year. Anyone could be a casual nonunion employee at the Company's option. It was the Employer who provided the definition. The employment period under these terms could exceed 3 years without the Employer becoming a member of the Union if the Company chose not to put the employee in the Union. However, should an employee complain, then Rudolf might be obliged to change his status,[51] a situation which had occurred once at his company. As noted, casual employees were not paid the wages called for in the contract and did not receive union health, welfare, and pension benefits.

Rudolf explained that, under the existing procedures, as agreed to by Ligurotis when the parties signed the Association's 1987–1990 agreement, as long as the men did not complain, Knous could have any number of men who could work 5 days a week, 8 hours a day, forever, and remain casuals as long as their full-time unionmen were working and as long as the workers did not complain. Should there be a complaint, the business agent would arrive and they would examine the employees' numbers of actual workdays. If there was disagreement, it was up to the company and business agent to resolve the problem.

Rudolf traced this understanding to a meeting he had had with Ligurotis and Rzewnicki in 1987 when the parties were negotiating the Association contract that became effective that year. Other management representatives also were present. At that meeting, Rudolf outlined his company's practice of putting out signup sheets for unionmen. If no unionmen, or only two, signed up, the Company automatically filled its work force with nonunion people. Rudolf testified that Ligurotis replied at the conclusion of what had been a long hard night of bargaining, ''Look guys, we all know that you use 'contractors' to do local work and as long as your men don't complain, you can continue to do that.''[52]

The only followup conversation occurred about a year and a half after the signing of the 1987 contract at a session attended by Rudolf, Bob Knous, Ligurotis, and Rzewnicki. The meeting concerned the issue of whether unionmen should be required to take overtime as opposed to allowing them to sign up for it voluntarily. The Company, where no unionmen

[50] The specification that the letter-agreement, which provided Jackson with significant relief from the terms of the Association contract, should be kept private and confidential, apparently was designed to evade the ''most favored nation'' clause of the Association contract.

[51] The above preamble to the Jackson addendum also validated that Employer's practice of keeping only four employees under the contract in part because it had not been protested by other employees.

[52] Rudolf explained that local work could be both household and commercial work, any work that did not go out of state.

had signed up, wanted to supplement its work force by using nonunion personnel. Ligurotis had stated on that occasion that if that was the practice that Knous had been employing and it worked, and the men were not complaining, why should it change? At Knous, contractors had been used not just to do packing, but to do all overflow work, including packing, office moving, local moving, whatever work was required.

Rzewnicki's definitions of casual and regular employees differed from those provided by Rudolf. As described by Rzewnicki, casual employees were used basically on large commercial jobs during the peak season of May through October, or on any prolonged job. They also might be used for short-term jobs such as to move voting machines during the weeks before and/or after the election. Casual employees received no benefits as long as they were paid according to whatever the contract required at the time. If a casual employee was dispatched for 1 to 3 days a week during consecutive weeks, after a 31-day period, they were to become union members. Rzewnicki further explained that if an employer called an employee sporadically on Monday one week, on Tuesday another week, and perhaps on a Monday during the following month, should the company deal directly with the employee and not come to the hall for extra help, and should the employee be released after the job or the particular day was over, the employee would be considered as a regular employee reporting at the time the company designated him to come in.

Regular employees, according to Rzewnicki, were dispatched by the Company without resort to the hall when work was available in a seniority position. Regular employees, covered by the terms of the collective-bargaining agreement, received health, welfare, and pension benefits.

Rzewnicki testified that the Jackson addendum was drawn during the negotiations for the 1987–1990 contract. The Knous Company, headed by Rudolf, had another Letter of Understanding with the Union that was altogether different from the Jackson agreement. Although the terms of those understandings varied from those available under the contract, the variance was in a particular field only. These understandings had come into being because Ligurotis, during the 1987–1990 negotiations, had stated that anyone who had a particular problem could talk to him and see if something could be worked out. Rzewnicki did not recall Ligurotis having made a statement to the effect that as long as the men were not complaining about contract terms, the employers did not need to enforce the contract.

After the 1987–1990 Association contract was signed, Rzewnicki, pursuant to Ligurotis' instructions to him and to the other business agents, worked to see that the contract was enforced. According to Rzewnicki, Ligurotis had instructed the business agents only to see that the contract was followed.

In this regard, during the term of that agreement, Rzewnicki had checked the ''barns'' to determine whether employers were living up to the contract and had found several occasions where (unidentified) employers were not. When this was brought to his attention, he met with relevant company officials. When matters could not be handled by a telephone call, they were followed by the grievance procedure. Not all instances were documented. The majority of complaints were settled informally. Rzewnicki gave as an example his discovery that Boyer-Rosen, one of the larger moving companies, had received grievances which were settled at the barn level. He testified that in his 40 years' experience in the industry, both as an employee and business agent, that there had been no industry practice that would permit a company to keep as regular union employees only a certain percentage of the total number of moving employees and to restrict coverage under the collective-bargaining agreement to that small group. He also denied that, on some past occasions, he had asked for more people to be included on the seniority list than Boyer-Rosen would agree to and that that Company and the Union had reached compromise.

Rzewnicki's testimony was supported by Michael Munroe, chief executive officer of Picken-Kane, perhaps the largest company in the Chicago area engaged in local commercial moving.[53] Munroe related that his company had had collective-bargaining agreements with the Union since the early 1950s and that, like the Respondent, Rzewnicki served as the employees' current business representative, having replaced Dicks. Munroe, as a signatory of the Association contract with the Union, testified that all 46 Pickens-Kane employees in job categories covered under that agreement were members of the Union and were governed by the terms of that contract. Munroe testified that although Dicks was the business agent for Local 705, all regular employees performing bargaining unit work, without exception, were covered by the collective-bargaining agreement. However, from time to time, his company employed part-time labor, mostly on weekends. Dicks would check once each week to see how many hours the men worked and then the employees would go into the Union, in accordance with the contract.

B. *Credibility, Discussion, and Conclusions*

As the parties have noted, the determination in this matter turns principally on resolutions of credibility. The first basic issue in this regard is whether, as the General Counsel and the Union contend, the Respondent unilaterally has unlawfully failed to apply the terms of the Association contract to all its eligible moving employees or whether, as the Respondent argues, it brought only some of its employees into union membership and under the coverage of the 1987–1990 Association agreement in accordance with a private 1987 understanding to that effect between Ligurotis and Manso. It is asserted that the existence of such a mutually agreed ''members only'' arrangement was corroborated, in part, by the January 1987 Letter of Understanding between the Respondent and the Union providing the Respondent with some relief from the terms of the concurrent Association contract; by the Union's prolonged acceptance of the Respondent's selective application of the agreement to its employees, as evidenced by the Union's failure to grieve or otherwise protest the Respondent's practices; and by the related experiences of other Chicago-area employees in the moving industry who also were given latitude to deviate from the terms of the Association agreement.

In considering what actually had been going on before the critical dates of March 21–22, it is undisputed that the Re-

[53] Munroe, chief executive officer of Pickens-Kane for the preceding 2 years, had been with that company for about 21 years, working his way up from mover, driver, and warehouseman through to the vice presidency of operations before assuming control.

spondent had openly pursued a practice of placing only 12 of its average size work force of 30–35 moving and warehouse employees into union membership and under coverage of the Association contract. Accordingly, only they, among the Respondent's employees, were union-represented and received the higher wages, work guarantees, and superior benefits there provided. In fact, 1 of the 12 covered employees, Franklin Park Facilities Manager Salemi, was not an employee but a supervisor within the meaning of the Act. Salemi's status as such is not in dispute. I conclude that the Union's representatives were aware of the Respondent's practices in this regard during the term of the 1987–1990 Association contract because, as noted and as stipulated, from November 1989 through March 1990, the Respondent had made contributions to the Union's health and welfare plan for only those same 12 employees and because, as described by Union Agent Rzewnicki, he regularly had visited the Respondent's premises and, presumptively having looked should have seen that the Respondent's operation was appreciably larger than was represented by the Respondent's monetary remittances. The Respondent's business, which included both household and commercial moves, also went beyond what had been contemplated for contract relief in the parties' Letter of Understanding. Little was left to the Union's imagination concerning the Respondent's practices in this regard because, in July 1989, having been advised by employee Mocerino that additional Respondent's eligible employees were seeking union membership. Union Representatives Rzewnicki and Dicks had gone to the Respondent's premises and had signed approximately 20–25 of its employees as new members. Nonetheless, as the above stipulation indicated, through March 1990, remittances to the fund continued for only the same 12 employees with no changes to reflect the increased membership, and no filed grievances or other protest by the Union. Although there is a conflict in the testimony of Manso and Rzewnicki concerning the latter's testimony that, during the February–March 1990 contract negotiations, Rzewnicki had asked what had happened to the new members signed up during the preceding July, I accept Manso's denial. If the Union, after detouring to sign up 20–25 new members, did not inquire into their status until at least 7 months had passed, it could well have waited even longer.

Because Ligurotis was not called as a witness, I credit Manso's undisputed account of their January 1987 conversation which led to the Letter of Understanding and during which Ligurotis specified that he did not expect the Respondent to commit all its eligible employees to the Union, but to merely include more employees should the Respondent, in time, prosper. The Respondent's prolonged ability to withhold its employees from union membership and from contract coverage further supported Manso's testimony. I likewise credit Manso's undisputed account of his March 21, 1990 conversation with Ligurotis.

The Respondent's experience in obtaining relief from the Union by side-agreement from the strict terms of the 1987–1990 Association contract was shared and even exceeded by other Chicago-area employees in the moving industry, supporting Manso's testimony that, in his 20 years of employment in different capacities in the moving industry—at Heberd, Licata, and with the Respondent—labor contracts had not been applied to all unit-eligible employees. Rudolf, current Association president and head of Knous, a moving company, testified that it had not been that industry's custom and practice to have all employees covered under the collective-bargaining agreement with the Union, but to maintain a list of regular seniority employees and then to have casual, irregular employees supplement the work force when there was an increase in the workload. Because of increased nonunion competition facilitated by legislation making it easier to enter the moving business, a situation had been created whereby unionized companies could survive only by hiring less expensive nonunion labor. With the Union's tacit consent, this practice had been followed by Rudolf's Knous Company and by other employers in the industry whom Rudolf has represented in his capacity as president of the Association. Accordingly, of the 50 to 60 employees that Knous on average employed, only about 35 to 50 employees were on the seniority list.

Rudolf, also without contradiction by Ligurotis, described a private side-agreement reached by Knous with Ligurotis, when the Association signed the 1987–1990 agreement, that as long as the established seniority employees received preference for the available work and the men did not complain, Knous forever could have any number of employees who worked 5 days a week, 8 hours a day while remaining casual employees were uncovered by the contract. It was up to the Employer to decide.

Rudolf identified the Jackson addendum to the Association agreement. There, in an understanding applicable only to Jackson Storage, the Union, to overcome that Company's there-noted resistance to subscribing to the Association contract without certain basic changes, agreed in writing that, in exchange for Jackson's acceptance of that agreement, that employer could retain its existing seniority list of four employees. The addendum specified that when those four employees were working full time, Jackson Storage would be free to utilize ''independent contractors, subcontractors[54] or non-unit employees to perform any and all work,'' and that the contract would not limit or restrict the use of such persons, or apply to them. Under that addendum, Jackson Storage was required to give preference to union employees, to seek referrals from the Union only for commercial moves performed in the Chicago loop area, and to give union status only to employees working full time on commercial moves for 6 months, except for those working at nights and on weekends. These were major limitations on the applicability of the Association contract to Jackson Storage which agreement, in broadly setting forth the employee classifications covered, did not distinguish between employees who performed household and those doing commercial moves, and which did not limit the Union's geographic jurisdiction solely to moves of any sort within the Chicago loop area. As noted, the Jackson addendum also provided for confidentiality so that other Association employers might not learn of and seek the easier terms of that accord under the ''most favored nation'' clause of the Association contract. Interestingly, too, as noted, the preamble to the Jackson addendum conformed to the 1987 private agreement between Knous and

[54] Rudolf explained that, as used in the industry and at his company, the term ''subcontractors'' also referred to nonseniority personnel.

the Union that continuation of the permitted contract relief would be contingent on other employees not complaining.

Although Munroe, principal officer of Pickens-Kane, one of the larger movers in the Chicago area, testified that, since the 1950s, when his Company had begun to contract with the Union, all of Picken-Kane's union-eligible employees had been union members and that the terms of the Association agreement had been strictly enforced, the scope of his testimony which, unlike Rudolf and Manso, related only to his own firm, merely established that not every company in the Chicago area moving industry had obtained variances from the Association contract.

However, noting that Ligurotis was not called to rebut the evidence of the respective private 1987 agreements between his union, the Respondent, and Knous; the Respondent's long tolerance of the Respondent's failure to apply its contract to all moving employees; the Union's agreement to the written Jackson addendum; and other considerations noted above, I accept Manso's testimony that the Respondent had not applied the terms of the Association agreement to all its eligible employees with the Union's acquiescence.[55]

Manso's credibility having been enhanced by the above finding that he had the Union's express and implied agreement that the Respondent was not required to place all its moving employees into the Union and under the labor contract, he is more readily believable in the context of further evidence, than was the opposing testimony of several striking employees, united in interest, when he testified that on and after March 22, he did not condition those employees' continued employment on their resignation from the Union or state that employees who engaged in a strike against the Respondent would be discharged.

In this regard, it was only when matters came to a boil in early 1990 as direct negotiations with the Respondent for a contract independent of the Association agreement were proving to be difficult, that the Union objected to the fact that the Respondent had not been applying the contract to all employees. The Union, only in February, had made its belated request for information tending to identify unit-eligible employees. By the time negotiations reached impasse on March 21, the battle lines had been drawn. Manso was ready to effectuate changes in employment terms, and the Union and its adherents among the Respondent's employees, as earlier in 1987, were prepared to strike to protect existing pay and benefits.[56] It is not contended in this proceeding that, during negotiations, the Respondent had bargained in bad faith, that bona fide impasse had not been reached, or that the Respondent had acted unlawfully on March 22 by announcing and effectuating the changes in terms and conditions of employment.

Logically, because the Respondent, on March 22, therefor was free to implement its last offer to the Union,[57] which Manso did by implementing the changes in employment terms and conditions announced that day, the Respondent had small financial incentive to also require that employees resign from the Union. This was because, without such requirement, the Respondent could lawfully effectuate the Company's less generous health insurance, long provided voluntarily to office employees; install the 401(k) plan to replace pensions; eliminate work guarantees and restrictions on subcontracting; and replace the contractual hourly pay scale with percentage payments for work actually done. In these circumstances, it not only would have been gratuitous for Manso to further insist that his employees resign from the Union to keep their jobs, but also such a demand, or a threat to terminate those who engaged in a strike, could unnecessarily complicate the Respondent's situation with no commensurate benefit. The freedom provided to the Respondent by this situation arising from impasse, where the bargaining relationship normally would be suspended although certainly not ended,[58] differed from that in 1987 when the extent of the Respondent's bargaining obligation, in part, was defined by the number of employees in the Union and unit and it was in Manso's economic interest to keep that number to a minimum. Here, it was to the Respondent's advantage to ensure that the less costly economic terms it was able to lawfully impose on March 22, at least for the time being, as a result of the impasse reached on the preceding day not be imperiled by accompanying unlawful conduct.

On March 22, the Respondent's seniority employees faced the stark choice of whether to continue to work for the Respondent under the newly announced employment terms or to strike in an effort to recover their more liberal job bene-

[55] In so concluding, I credit the testimony of Lanzano and Hornbaker that, in 1987, they were threatened by the Respondent when Lanzano had independently joined the Union and Hornbaker had served notice that he wanted to do so. The testimony of these employees concerning the events in question was precise and detailed, although the denials by Richied and Manso were less specific. Richied's inability to recall whether he had told Lanzano in early 1987, that if he went to the Union, he would have no work with the Respondent, was less than an absolute denial. Manso's denial that he had threatened Lanzano for joining the Union was made against a background where he had kept Lanzano out of the Union during his more than 6 years with the Company and had had a financial interest in continuing that arrangement. Moreover, after the treatment that Lanzano had received from Richied when he told Richied that he wanted to join the Union, Manso's testimony that, on that occasion, he only had asked why Lanzano had not come to see him before going to the Union, does not resonate. As to Hornbaker, Manso did not recall the specific conversation Hornbaker had described and merely entered a general denial which I find less convincing than Hornbaker's precise account.

Although I do not condone the Respondent's conduct toward Lanzano and Hornbaker in those 1987 incidents, these events are not remediable since they occurred well outside the 6 months' limitations period under Sec. 10(b) of the Act. Although the experiences of these men show that the Respondent, in 1987, was not above applying unlawful pressure to certain of its employees to discourage union membership, this does not overcome the more abundant evidence that the Union had agreed to the Respondent's practice of excluding most of its eligible employees from union membership and coverage under the collective-bargaining agreement. Although the Respondent's 1987 conduct toward Lanzano and Hornbaker raises suspicion that other of its employees also may have been coerced at the time, Hornbaker and Lanzano were but 2 of an average work force of 30–35, and suspicion is not tantamount to proof. Although the clear purpose of this evidence was to support the testimony of the General Counsel's witnesses that Manso also had engaged in unlawful conduct as alleged in the complaint, for reasons to be discussed, I do not find this to be the case.

[56] As noted, the parties were at impasse on health and welfare, pensions, subcontracting, and the guaranteed workweek.

[57] *I. Bahcall Steel & Pipe*, 287 NLRB 1257, 1262 (1988); *L. W. Le Fort Co.*, 290 NLRB 344 (1988).

[58] *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1393–1395 (5th Cir. 1983).

fits. In concluding that these employees were not coerced to resign from the Union, I also note that Manso's later conduct in not replacing strikers but in repeatedly, over a period of months, inviting their return, orally and in writing, was more consistent with his asserted efforts to retain experienced long-time employees than with attempts to be rid of striking union activists. On the other hand, if the Union, having long concurred in breaches in the application of its labor contract, and having reached impasse with the Respondent, could not establish that its members, in some way, had been moved to strike by the Respondent's unlawful conduct, its only remaining option would have been to accept Manso's reduced terms or risk a possibly unproductive economic strike. Accordingly, on March 22, and thereafter, the Union and its adherents had incentive to establish circumstances for an unfair labor practice strike.[59]

In my view, the weight of the credible evidence indicates that Manso, during the March 22 meeting, did not supplement the statement that he read and had distributed to employees with the unlawful remarks charged. Rather, Manso merely informed the employees that, if there was a strike, the law allowed the Respondent to hire employees who would work in place of those who declined to cross the picket lines; to permanently replace strikers as long as the replacements continued to fill those positions; and that the Union could fine employees who remained union members but who crossed the picket line. Reiterating, Manso's statement on this point was that:

> If [an employee] wants to avoid being fined, he should resign his union membership before he crosses the picket line. All that is needed is a single letter to the union saying that you are resigning your union membership.
>
> We are not at all suggesting that you have to resign from the union to keep your job. We mention resignation only because that is the only way you can come to work during a strike without running the risk that the union will fine you.

In reaching the conclusions here, I have not placed principal reliance on the testimony of Respondent's witnesses, Richied, Robert Licata, or of employees Haran, Mason, Ingram, and Jordan, as to what was told to employees on this matter at the March 22 meeting, although their accounts are consistent with my findings. This is because they particularly lacked independence from the Respondent. Richied and Licata were tied to Manso as members of management, while the other above-named individuals would have small incentive to testify against Manso's interest, having continued to work for the Respondent. Haran, Manso's former brother-in-law,[60] resigned with Jordan from the Union on March 22, and Haran was an outspoken supporter of the Respondent's position among other employees. Ingram and Mason, who had not been in the Union while employed by the Respondent, appeared to be happy to be employed there at whatever terms were available and, in my view, appeared unlikely to testify against the Respondent's interest.

Lanzano, on the other hand, was not a particularly credible witness for the General Counsel because his conduct was so erratic. Whatever Lanzano may have heard at the March 22 meeting did not cause him to join the strike. Instead, he resigned from the Union, worked for the Respondent for the remainder of the day, and crossed the picket line, prepared to work, on the following day. It was only later on March 23 when, after crossing the picket line, he received a work assignment that he did not consider to be sufficiently remunerative and inconsistent with asserted claimed promises to take good care of him, that he joined the strike. At that point, Lanzano had not been motivated by what Manso might have said at the March 22 meeting, but by his disappointment at being lured across the picket line for less than the expected remuneration.

I also do not credit Wade's testimony because it does not appear to be reasonable. Wade testified that he did not recall receiving a copy of Manso's statement, which the parties stipulated was distributed at the March 22 meeting, or copies of Manso's above May 21 and August 20 letters to employees. He further testified that even if he had received a copy of the March 22 statement, he could not have read it because he had not had his eyeglasses.[61] Also, Wade was the only witness to testify for either side that he, or anyone else, had walked out of the March 22 meeting before it was concluded. I find Wade's above testimony to be unreasonable because it is difficult to accept that Wade, then a 26-year employee with his job and associated benefits on the line, and whose wife's need for major health benefits could only magnify his concern, would not be deliberately aware of every document and factor affecting his employment situation. In this context, Wade's stated inability to recall ever having received three Employer-generated documents, the distribution of which is not in doubt and which so materially affected his job with the Respondent, appears as a calculated effort to distance himself from evidence that might be considered contradictory to his testimony. This is because, as noted, these documents specifically disclaim any Respondent's requirement that employees resign from the Union to continue work.

I therefore accept Manso's account concerning his two conversations with Wade. Noting that Manso's testimony was convincingly detailed and precise, I find that although Manso and Wade had engaged in name calling during their second picket line conversation, Manso having taken offense about an earlier remark made about him by Wade, I do not find that Manso had challenged Wade to a fight or had

[59] By the end of March 21 and before the March 22 meeting, the Respondent's plans to implement changes in employment terms could not be considered a secret. As noted in counsel for Respondent's March 21 letter to the union counsel, that day was to be ''make or break'' day and the parties had reached impasse. The Union was aware of the issues separating the parties and of the Respondent's final offer. Ligurotis and Manso had discussed their differences. That evening, Manso described some of his intended changes to Hornbaker during their telephone conversation.

[60] Haran and Manso continue to have shared as relatives the children of Manso's now-ended marriage to Haran's sister.

[61] The March 22 statement also was sent to employees as an enclosure with the May 21 letter.

threatened him with physical harm while or because he was picketing.[62]

I credit Robert Licata's denial of Martinez' testimony that, on March 23, Licata, during a phone call to Martinez' home to ask if he was coming back to work, had told Martinez that if he did, ''he would have to come back under Mr. Manso's rules.'' Although the applicable rules were not specified, this could be germane only as a reference to the asserted Respondent's requirement that employees must resign from the Union to work for the Company.

Licata agreed that he had called Martinez at home on March 23 because his responsibilities included making assignments and he had to know who would be working. However, I accept Licata's testimony that he did not tell Martinez, in effect, that he would have to resign from the Union to come to work Because, at that time as he testified, he had reason not to believe that Martinez was in the Union. As noted, before the strike, Martinez had not been covered under the labor agreement and dues, health/welfare and pension contributions had not been remitted on his behalf. In addition, on March 22, after the strike began, Martinez had worked a full day for the Respondent, having been dispatched by Licata. Martinez testified that he did not begin to picket until the early morning of March 23. Although Licata might have gauged Martinez' union sympathies if, before calling, he had observed Martinez on the picket line on March 23, it is not clear that he did so and Martinez' status with the Union on March 23 was sufficiently ambiguous to sustain Licata's testimony. This is because by the end of March 23, Martinez, whose union membership had not been established, on successive days had both crossed the picket line to work and had joined in the picketing. It could not have been clear to Licata what Martinez would do next.

Having found that Licata's testimony concerning their first conversation was more logically grounded than was Martinez', I credit Licata's further testimony that he did not call Martinez 2 days later with the same inquiry, promising that Martinez could come back with full seniority with only the requirement that he resign from the Union. As noted, until then, Martinez had not been considered a seniority list employee. Rather, I accept Licata's testimony that he next spoke to Martinez in early May when Martinez had called to announce that he, Lanzano, and Yracheta were returning to work the next day, at which time Licata agreed to have work for them. In accepting Licata's testimony in this regard, I note that he was more credible than Martinez with respect to the first conversation, and that the Respondent would have been less likely to press Martinez to return because, according to Manso, he was not as highly regarded an employee as were Wade, Yracheta, and Burke. Also, Licata's version of the second conversation fits in with the undisputed short-lived understanding that Lanzano, Yracheta, and Martinez were going to return.

I am not persuaded from the evidence concerning the applications for 401(k) benefits, sought by Yracheta and other striking employees, that the Respondent had discharged any of the workers involved. After Manso indicated on Yracheta's application form that Yracheta had been terminated as of April 1, other striking employees, by their apparently uniform response, saw this as a means of clarifying their own asserted status as dischargees. This was because there is no evidence that on March 22, when the strike began, anyone from the Respondent's management group had told any of them that they were terminated. They simply had walked out and begun picketing.

Although Manso initially had tried to assist Yracheta in obtaining his 401(k) benefits, the record establishes that Manso had made an honest mistake in his overall handling of a form with which he had no prior familiarity, both in the way in which he had filled in the form and in which he then had sent it to Yracheta to complete and forward to Lincoln National. Manso later learned that such forms were to be submitted to Lincoln National only through him. When Manso thereafter was corrected by Sinclair of Lincoln National as to the procedures and reasons for obtaining 401(k) benefits, Manso explained his error in Yracheta's form and what he had been told to Yracheta, Lanzano, and Mocerino, telling them, over their protests, that they had not been terminated. Manso's refusals to make termination entries on the 401(k) application forms of the other employees, although they pressed him to do so, was consistent with his May 21 and August 20 letters to employees.

Other explanations exist as to why the strikers did not return to work for the Respondent besides, as contended by the General Counsel and the Union, that the employees would have to surrender union membership. Employees, such as Wade, were reluctant during a strike to take steps that might compromise their union-associated health and other benefits, which no longer would be available as Respondent's employees under the announced changes in employment terms. A considered statement of striking employee rationale for not returning was given by Hornbaker who explained why he had not responded to Manso's May 21 letter inviting the employees' return without precondition. Hornbaker testified that although he believed the statement in Manso's letter that he would not have to resign from the Union to return to work, it did not make sense for him to work without the Union. If he did not resign his membership (during the strike), he risked that the Union would fine him. If Hornbaker did go back to work without a contract, the Union could not help him with any problems he might have and, also, he would not receive any union-associated job benefits. Accordingly, because it was not logical for him to continue to remain a union member while working for the Respondent without a contract, he might as well have resigned from the Union. This, however, he did not want to do. Hornbaker then returned to the common line that he could not go back to work because the Respondent would require that he resign from the Union. In view of the above general explanation, Hornbaker's last protest is unconvincing.

Accordingly, I find that the weight of the credited evidence establishes that the Respondent, through Manso, Robert Licata, and its other officials, on and after March 22, did not violate Section 8(a)(1) of the Act by, respectively, telling employees that they would be discharged if they engaged in a strike against the Respondent; or that their continued employment with, or ability to return to work for, the Respondent was contingent on their resigning from the Union.

[62] Burke, who testified that, months later, he had seen from his car what seemed to be a heated conversation between Manso and Wade, could not hear what was said and did not materially corroborate Wade.

Having found that the Respondent, on and after March 22, did not make the above alleged unlawful statements and, therefor did not make employment contingent on unlawful conditions, I conclude that the Respondent did not violate Section 8(a)(3) and (1) of the Act by discharging or causing the termination of those employees who on, and after, March 23, joined in a strike against the Respondent. Rather, I find that the strike that began on March 22, at its inception, was economic in nature, and the strike was not thereafter prolonged or transformed into an unfair labor practices strike by later, above-described, conversations between striking employees and Respondent's officials, including Manso and Robert Licata.[63]

Because impasse was validly reached on March 21 at the negotiating table and the changes in employment terms announced on March 22 were not attacked as unlawful, the Respondent's inducement to its employees to resign from the Union solely to avoid being fined, in the absence of unlawful threat of employer reprisal or promise of benefit, similarly was not in violation of the Act.

Contrary to the General Counsel, the Board in *G. M. Trimming, Inc*., [64] held that a union acts too late when, with prolonged knowledge that its contract had not been applied to all unit-eligible employees, it belatedly seeks to include those other employees in the bargaining unit. In *G. M. Trimming*, a highly integrated sole proprietorship and a group of corporations, all controlled by the same individual, were found to be alter egos engaged in the manufacture of sportswear at one factory. A single employerwide bargaining unit was found to be appropriate. However, historically, only the employees listed as being employed by one of these alter ego corporations had been included under the series of labor agreements with the union in that matter. The Board denied the claim of the union in that matter to represent the other employees working in the loft and for funds contributions on behalf of those employees on the grounds that the union repeatedly had renewed its contract with the one corporation with the full knowledge of union representatives that other companies owned in common operated out of the same premises. The Board found that union officials had had opportunity to observe that there were large numbers of employees performing unit work who were not members of the bargaining unit and held that, in those circumstances, the union had not met its obligation to speak up. The union's failure to protest compelled the conclusion that the union had acquiesced in the exclusion of the other employees from the bargaining unit. Accordingly, the union could not then claim that the failure of that respondent to pay into the funds on behalf of the uncovered employees violated Section 8(a)(5) and (1) of the Act.

Although factual differences between *G. M. Trimming* and the present matter exist, that case does describe the obligation of a union to protest when its contract is not being applied to the entire unit and the consequences of not doing so. Both *G. M. Trimming* and the present matter rest, not on waiver, but on union acquiescence inferred from long deliberate tolerance of the situation, without timely protest. Here, unlike *G. M. Trimming*, the Union's initial agreement to the understanding cannot be fully derived from the language of its collective-bargaining contract, which was inclusive as to all relevant employees, but from Manso's unchallenged account of his 1987 oral agreement with Ligurotis[65] and the practices that followed which were consistent with such an agreement.

The General Counsel's argument, based on *Prestige Bedding Co*.,[66] that parol evidence cannot be used to establish modification of the written, unambiguous, lawfully framed labor agreement so as to establish that it has been applied on a ''members only'' basis was considered in *Schorr Stern Food Corp*.,[67] where the administrative law judge, in his Board-approved decision, held as follows:

> Although the Respondent is correct in noting that extrinsic evidence of a ''members only'' practice is considered by the Board in refusal to bargain and representation cases, where the questions concerning the state of actual employee representation is basic to determination, such evidence does not constitute a general exception to the parol evidence rule applicable in cases arising in different context. In matters under Section 8(a)(5) of the Act . . . such as *Don Mendenhall* (194 NLRB 1122, 1123), the Board declined to issue bargaining orders because of the insufficiency under the Act of recognition on a ''members only'' basis. . . . Accordingly, to the extent that a ''members only'' practice was considered by the Board, it was not regarded with particular favor. . . . [I]t is concluded that evidence of a misapplication of a collective-bargaining agreement by a ''members only'' practice merely serves to render the contract invalid for purposes of obtaining affirmative relief under the Act . . . but does not shield a party from liability for unlawful conduct occurring thereunder.

For the above reasons, as argued by the Respondent, I find that the Company and the Union had applied the labor agree-

[63] Although the Respondent, on March 22, did make Seiner available to type ''resignation-from-the Union'' forms for interested employees and was willing to facilitate that process, such conduct was not unlawful. *Chicago Beef Co*., 298 NLRB 1098 (1990). The credited evidence reveals that the Respondent's inducement to resign was that its employees avoid the possibility of being fined by the Union should they remain members of that organization although continuing to work during an anticipated strike. I agree with the General Counsel that McKinley Jordan's testimony that he had resigned from the Union on March 22 so that he would not be ''fired'' by the Union was ''peculiar'' because the transcript of his testimony in this regard showed an obvious typographical error. The intended word was ''fined.'' Contrary to the General Counsel's point that Jordan resigned before the strike, unaware that it was about to occur, and therefore had been motivated to do so for reasons unrelated to what might happen during a strike, the record reveals that Jordan resigned from the Union at the same time as Haran, who did expect a strike, and that their resignations took place while the initial strikers, including Burke, Wade, and Yracheta, having heard Manso's new employment terms, were openly announcing reasons for not working that day.

[64] 279 NLRB 890, 895–899 (1986).

[65] I draw adverse inferences from the failure to call Ligurotis to testify concerning his 1987 conversations with Manso and Rudolf and, therefor, conclude that Ligurotis had been called, he would have given evidence adverse to the Union. *Property Resources Corp. v. NLRB*, 863 F.2d 964 (D.C. Cir. 1988).

[66] 212 NLRB 690, 700 (1974).

[67] 227 NLRB 1650, 1654 (1977).

ment on a ''members only'' basis with respect to the Respondent's employees, extending the coverage and benefits of the contract only to those employees who were union members. As noted, the Board does not issue bargaining orders in ''members only'' units.[68] Therefore, I conclude that the Respondent did not violate Section 8(a)(5) and (1) and Section 8(d) of the Act by its failure to apply the terms of the collective-bargaining agreement to all unit-eligible employees, including by its failure to make contributions to the health/welfare and pension funds on behalf of unit employees were were not union members; and by not furnishing the information requested by the Union in its February 6 correspondence and orally thereafter.[69]

It is found, however, that the Respondent, during the term of the contract here, even with the Union's acquiescence, by providing greater remuneration in the form of higher wage rates, superior health/welfare, pension, and vacation benefits, work guarantees, and other contractual employment benefits of economic significance to employees selected to be union members than to nonunion members, for the work which all unit employees performed, discriminated against its nonunion employees with regard to terms and conditions of employment so as to encourage membership in the Union. I conclude that by such conduct the Respondent violated Section 8(a)(3) and (1) of the Act.[70] Because, under the language of the contract, the Respondent did recognize the Union as the sole collective-bargaining representative of all its employees in the above-described unit, it was legally bound to apply the terms and conditions of the contract to all such employees. Otherwise, the nonunion employees would be left with no means of equalizing the situation.[71]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

[68] *Schorr Stern Food Corp*., supra; *Richmond Homes*, 245 NLRB 1205, 1209–1210 fn. 12 (1979); *Mfg. Woodworkers Assn. of Greater New York*, 194 NLRB 1122 (1972).

[69] Ibid.

[70] *Schorr Stern Food Corp*., supra at 1654; *Richmond Homes*, supra. *Vanguard Tours*, 300 NLRB 250 (1990), cited by the Respondent, is applicable here principally to the extent that the Board in that matter found that the unfairness inherent in a two-tiered system of wages, hours need not result in a remedy if the reasons for same are lawfully grounded. In *Vanguard Tours*, unlike the present case, the Respondent was permitted under the language of the contract, which was not under attack, to include in the unit all ''regular'' employees, but no ''part-time'' employees. The Board found that the Respondent, in so doing, merely conformed to what was permitted under the labor agreement and that the Employer had been motivated by economic rather than union-based considerations. The inclusive contract language covering all moving employees applicable here permits no comparable distinctions.

[71] *Gaynor News Co. v. NLRB*, 347 U.S. 17, 37–38 (1954); *Schorr Stern Food Corp*., supra.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discriminating with regard to the terms and conditions of employment of nonunion employees performing unit work because they were not union members, the Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that the Respondent be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been concluded that the Respondent has discriminated against its nonunion unit employees with respect to wage rates, work guarantees, health/welfare, pension, vacation, and other compensatory benefits provided in the 1987–1990 Association contract, it is recommended that the Respondent be required to make whole all past and present nonunion employees who are, or were, steady,[72] excluding casual and on-call employees, and who were employed by the Respondent in work classifications embraced by the unit as set forth in the then-applicable collective-bargaining agreement from November 16, 1989, to March 21, 1990,[73] for any loss of pay, insurance, pensions, vacations, guaranteed worktime, or other benefits they may have suffered by reason of the Respondent's failure to apply the terms and conditions of the collective-bargaining agreement to them in the same manner as it did to its union employees for both commercial and household moves. Reimbursement shall be made for any losses suffered by nonunion employees by reason of the discrimination against them in accordance with the formula set forth in *F. W. Woolworth Co*.,[74] with interest thereon as provided in *New Horizons for the Retarded*.[75]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[76]

[72] Art. 4, sec. B, of the applicable contract defined a steady employee as continuously employed 6 months or longer, except that the last 3 months need not be continuous but may be accumulated over a period of time.

[73] November 16, 1989, is the date 6 months prior to the filing of the charge here, commencing the period cognizable under Sec. 10(b) of the Act. March 22, 1990, is the date, as found above, when the Respondent discontinued its unlawful conduct in this regard by providing compensation and job benefits to all unit employees without regard to union membership.

[74] 90 NLRB 289 (1950).

[75] 283 NLRB 1173 (1987).

[76] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Reebie Storage and Moving Co., Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminating against any of its employees by denying them coverage under a collective-bargaining agreement and by otherwise failing or refusing to grant its employees contractual wage rates, health/welfare, vacation, pension, and other employment benefits because such employees are not members of the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all present and past nonunion employees employed by the Respondent in the period from November 16, 1989, to March 22, 1990, in work classifications covered by the unit as described in the collective-bargaining agreement, effective 1987 to 1990, between Truck Drivers, Oil Drivers, Filling Station and Platform Workers, Local No. 705, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO, and the Movers' Association of Greater Chicago, for any loss of wages, health/welfare, pension, vacation, and other employment benefits they would have received but for the discrimination against them in the manner described above in the remedy section of this decision.

(b) Post at its facilities in Franklin Park and Chicago, Illinois, copies of the attached notice marked ''Appendix.''[77] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[77] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found here.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discriminate against any of our employees by denying them coverage under our collective-bargaining agreement with Truck Drivers, Oil Drivers, Filling Station and Platform Workers, Local No. 705, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, or any other labor organization, by not granting our employees pay rates, work guarantees, health/welfare, pension, vacation, and other employment benefits because they are not members of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise the rights guaranteed them by Section 7 of the Act.

WE WILL make whole, with interest, any of our nonunion employees who presently are, or who formerly were, employed by us from November 16, 1989, to March 22, 1990, in work classifications described in the collective-bargaining agreement between the above-named Union and the Movers' Association of Greater Chicago, effective 1987 to 1990, by which we were bound, for any loss they may have suffered during the above November 1989 to March 1990 period by reason of our not having provided them with pay rates, work guarantees, health/welfare, pension, vacation, and other employment benefits to the extent that such benefits were granted to our employees who were members of the above-named Union.

REEBIE STORAGE AND MOVING CO., INC.